

**The Department of Commerce
United States Patent and Trademark Office
National Telecommunications and Information Administration**

Docket No. 10090448-0448-01

**RESPONSE OF NETCOALITION AND THE COMPUTER & COMMUNICATIONS
INDUSTRY ASSOCIATION TO THE NOTICE OF INQUIRY ON COPYRIGHT
POLICY, CREATIVITY, AND INNOVATION IN THE INTERNET ECONOMY**

TABLE OF CONTENTS

<u>I. GENERAL OBSERVATIONS</u>	<u>2</u>
<u>II. THE COSTS TO THE U.S. ECONOMY RESULTING FROM THE INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS</u>	<u>6</u>
1. THE OBJECTIVITY FALLACY	8
2. THE LOST SALE FALLACY	10
3. THE CAUSATION FALLACY	11
4. THE INNOVATION FALLACY	13
A. INCENTIVES TO INNOVATION	13
B. IP PROTECTION CHILLING INNOVATION	16
C. THE CHAMBER STUDY	18
5. THE INDUSTRY SIZE FALLACY	19
6. THE EQUIVALENCE FALLACY	21
A. WILLFUL PATENT INFRINGEMENT VS. REGULAR PATENT INFRINGEMENT	21
B. COUNTERFEITING VS. TRADEMARK INFRINGEMENT	22
C. WILLFUL COPYRIGHT INFRINGEMENT VS. REGULAR COPYRIGHT INFRINGEMENT VS. INNOCENT INFRINGEMENT	23
D. WILLFUL VS. ORDINARY VS. INNOCENT DMCA VIOLATIONS	24
E. THE COMPLEXITY OF INFRINGEMENT LITIGATION	25
7. THE THEFT FALLACY	32
8. THE SILO FALLACY	33
9. THE RELEVANCE FALLACY	38
10. CONCLUSION TO DISCUSSION OF ECONOMIC IMPACT OF INFRINGEMENT	39
<u>III. COPYRIGHT, INFRINGEMENT AND INNOVATION</u>	<u>40</u>
1. THE BALANCE IN EXISTING COPYRIGHT LAW RELATING TO THE INTERNET	42
A. DMCA	42
B. SECONDARY LIABILITY	46
C. FAIR USE	49
D. COICA	55
2. INTERNATIONAL EFFORTS	60
A. ACTA	60
B. PRINCIPLES FOR INTERNETIONAL NEGOTIATIONS	62
C. ACTIVITIES BY U.S. GOVERNMENT PERSONNEL OVERSEAS	67
D. REEVALUATION OF IP FOREIGN POLICY	68
3. BUSINESS MODELS THAT DISCOURAGE INFRINGEMENT	70

4. VOLUNTARY PROGRAMS THAT REDUCE INFRINGEMENT	73
A. EBAY	74
B. YOUTUBE	75
5. PUBLIC AWARENESS OF COPYRIGHT LAW	76
6. CREATIVITY ONLINE	78
7. PROPOSED CHANGES TO THE U.S. COPYRIGHT ACT	80
A. AMEND STATUTORY DAMAGES -- SECTION 504(C)(2)	80
B. PRESERVE THE FIRST SALE DOCTRINE – SECTION 109(A)	83
C. ORPHAN WORKS/MASS DIGITIZATION	84
D. MISUSE	86
E. MUSIC LICENSING REFORM -- SECTION 115	89
IV. CONCLUSION	90

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NetCoalition and the Computer & Communications Industry Association (CCIA) welcome this opportunity to respond to the notice of inquiry published in the Federal Register at 75 Fed. Reg. 61418 (Oct. 5, 2010).

NetCoalition serves as the public policy voice for some of the world's most innovative Internet companies on legislative and administrative proposals affecting the online realm.¹

CCIA represents large, medium-sized, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications and Internet products and services – companies that collectively generate more than \$250 billion in annual revenues.²

The notice of inquiry invites comments on the challenges of protecting copyrighted works online and the relationship between copyright law and innovation in the Internet economy. This submission begins with general observations relevant to the inquiry. It then discusses aspects of the economic costs resulting from IP rights infringement. The next section addresses aspects of the relationship between copyright law and innovation in the Internet economy.³

¹ NetCoalition's members include Amazon.com, Bloomberg LP, eBay, IAC, Google, Wikipedia, and Yahoo!

² A complete list of CCIA members is available at <<http://www.ccianet.org/members>>.

³ Portions of this submission are based on the responses of NetCoalition and CCIA to the Intellectual Property Enforcement Coordinator's Request for Comments on the Joint Strategic Plan, 75 Fed. Reg. 8,137 (Feb. 23, 2010).

I. GENERAL OBSERVATIONS

Historically, the enforcement of IP rights has largely been left to the rightsholders. Rightsholders have private rights of action for copyright, patent, and trademark infringement.⁴ Congress created a criminal copyright offense that could be prosecuted by the federal government only in 1897, more than 100 years after adoption of the first Copyright Act. Until 1982, this offense was only a misdemeanor. There is no criminal patent infringement offense. And in the trademark area, criminal behavior arises only with respect to counterfeiting. Outside of customs procedures, the federal government does not have the authority to bring a civil IP enforcement action that is unrelated to criminal behavior.

This relatively limited federal role is completely appropriate. IP rights in this country are seen as economic rights; and typically these economic rights are possessed by well-financed entities that have the ability, responsibility, and the incentive to enforce them. The federal government has played a more active role in cases involving counterfeiting because such cases can have a direct impact on public health and safety. When the federal government acts to prevent the distribution of counterfeit pharmaceuticals, airplane parts, or software, its motivation is not primarily the protection of the economic interests of the companies whose intellectual property is infringed; rather, it is the health and safety of consumers who may use these counterfeit products.

In recent years, certain industries have sought to change this basic paradigm. In particular, entertainment companies and manufacturers of luxury goods are seeking to increase the federal government's involvement in the protection of their IP rights. These companies believe that the advent of the Internet poses an unprecedented threat to the existence of their industries that warrants an unprecedented federal intervention. While we largely disagree with

⁴ See, e.g., 17 U.S.C. § 501(b).

this view, we believe that these industries are entitled to have a robust public policy debate about the degree of the threat and the appropriateness of various forms of government assistance.⁵

What is objectionable is the effort by some to blur the distinction between different forms of infringement. The harm to public health and safety caused by some counterfeit products is completely different from the harm to business models that may be caused by peer-to-peer (P2P) file sharing, cyber-lockers, or e-commerce sites. And clear acts of infringement such as P2P file sharing are completely different from cases that involve complex issues such as the idea/expression dichotomy, first sale or fair use. To be sure, all these cases may concern allegations of “IP infringement,” but they involve very different policy considerations, and must be discussed separately if rational policy-making is to occur. It is not surprising that luxury goods manufacturers or professional sports leagues seeking to improve their bottom lines will try to associate themselves with efforts to protect public health and safety.⁶ Administration policy, however, must not fall for this ruse, and the Department of Commerce’s Internet Policy Task Force must maintain firewalls between the different categories of alleged infringement when developing policy in this area. The notice of inquiry appropriately does not mix together different categories of alleged infringement, and we hope that the Task Force’s report does not either.

The Task Force must also recognize that our IP laws are based on the balancing of the interests of authors and inventors on the one hand with the interests of the public on the other.

Quoting Thomas Jefferson, the Supreme Court in *Bonito Boats v. Thunder Craft Boats*

⁵ Since the constitutional basis of copyrights and patents is Article I, section 8, putting the duty of enforcement on rights owners is most consistent with the constitutional purpose of those rights: stimulating the advancement of science and the useful arts. If the intellectual property rights in fact foster innovation (which it must do to be consistent with Art. I section 8), the rightsholders (rather than the government or a third party) should be motivated to protect their economic incentive, and be best positioned to enforce those rights.

⁶ See, e.g., Letter from Dan Glickman, Chairman and C.E.O., MPAA, to Senator Patrick M. Leahy (November 19, 2009) available at <http://www.publicknowledge.org/pdf/mpaa-acta-letter-20091119.pdf> (urging inclusion of measures to combat “Internet piracy” in a treaty nominally addressed to “counterfeiting”).

recognized that “federal patent law has been about the difficult business ‘of drawing a line between things which are worth to the public the embarrassment of an exclusive patent, and those which are not.’”⁷ The Court observed that “[t]he Patent Clause itself reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the ‘Progress of Science and useful Arts.’”⁸

The Supreme Court stated in *Sony v. Universal City Studios* that

Congress has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or inventors in order to give the public appropriate access to their work product [T]his task involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society’s competing interest in the free flow of ideas, information, and commerce on the other⁹

Likewise, the Fifth Circuit wrote that in the Copyright Act “Congress balanced the competing concerns of providing incentive to authors to create and of fostering competition in such creativity.”¹⁰

More recently, the Supreme Court has addressed balancing the interests of the entertainment and technology industries. In its 2005 decision in *Metro-Goldwyn-Mayer Studios v. Grokster*, the Supreme Court recognized that the copyright law maintained a “balance between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement.”¹¹ The Court noted that “[t]he more artistic protection is favored, the

⁷ *Bonito Boats, Inc., v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 148 (1989) (quoting 13 Writings of Thomas Jefferson 335 (Memorial ed. 1904)).

⁸ *Id.* at 146.

⁹ *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

¹⁰ *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458, 1463 (5th Cir. 1990).

¹¹ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 928 (2005).

more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the trade-off.”¹²

Understanding the importance of maintaining balance between the various interests served by the intellectual property laws, the Chief Judge of the U.S. Court of Appeals for the Ninth Circuit, Alex Kozinski, has recognized that

Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each creator building on the works of those who came before. Overprotection stifles the very creative force it’s supposed to nurture.¹³

Chief Judge Kozinski concluded that “[t]his is why intellectual property law is full of careful balances between what’s set aside for the owner and what’s left in the public domain for the rest of us.”¹⁴

The Supreme Court’s intellectual property cases typically concern substantive rights rather than enforcement procedures. But in *Fogerty v. Fantasy*, the Court addressed the issue of attorneys’ fees. The Court explained the importance of maintaining a level litigation playing field so that defendants would be encouraged to assert meritorious defenses:

Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible. To that end, defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement [A] successful defense of a copyright infringement action may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim by the holder of a copyright.¹⁵

The importance of balanced intellectual property protection often gets lost in policy discussions in Washington. Fortunately, last year the U.S. government affirmed its support for

¹² *Id.*

¹³ *White v. Samsung Electronics of America, Inc.*, 989 F.2d 1512, 1513-16 (9th Cir.)(Kozinski, J., dissenting), cert. denied, 113 S. Ct. 2443 (1993).

¹⁴ *Id.*

¹⁵ *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994).

balanced copyright laws at a recent meeting of the Standing Committee on Copyright and Related Rights of the World Intellectual Property Organization. Justin Hughes, the head of the U.S. delegation, stated:

We recognize that some in the international copyright community believe that any international consensus on substantive limitations and exceptions to copyright law would weaken international copyright law. The United States does not share that point of view. The United States is committed to both better exceptions *in* copyright law and better enforcement *of* copyright law. Indeed, as we work with countries to establish consensus on proper, basic exceptions within copyright law, we will ask countries to work with us to improve the enforcement of copyright. This is part and parcel of a balanced international system of intellectual property.¹⁶

The Task Force should not recommend changes that would upset the balance that is a fundamental feature of our intellectual property law. Its report should reflect Chief Judge Kozinski's admonition that overprotection of IP is as harmful as underprotection. And it should respect the Supreme Court's perspective that a successful defense of an IP infringement action may further the policies of the IP laws every bit as much as a successful prosecution of an infringement claim by a rightsholder.

II. THE COSTS TO THE U.S. ECONOMY RESULTING FROM THE INFRINGEMENT OF INTELLECTUAL PROPERTY RIGHTS

The notice states that “[d]uring the listening sessions, the Task Force heard that online copyright infringement is depriving U.S. copyright owners of their rights and compensation, and causing substantial economic harm to the copyright industries, their employees, independent

¹⁶ Statement, United States of America, Statement on Copyright Exceptions and Limitation for Persons with Print Disabilities, World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, 19th Session (Dec. 15, 2009) at 5. According to Rep. Howard Berman, Chairman of the House Committee on Foreign Relations, “[t]he U.S. is a world leader in part because of its robust and balanced protection of intellectual property.” He added that “IP protections must be balanced against the legitimate interests of consumers and other users to best promote economic and social productivity.” *Communications & Intellectual Property Policy Briefing*, Roll Call, Oct. 22, 2007, at 17. Similarly, the Vatican observer at the United Nations, Mons. Silvano Maria Tomasi, at the 48th General Assembly of the World Intellectual Property Organization (WIPO) in Geneva, stated “A stronger system of protection could either enhance or limit economic growth. While strengthening IPRs has potential for enhancing growth and development in the proper circumstances, it might also raise difficult economic and social costs.” Nate Anerson, *Excessive Zeal for IP Rights*, ARS TECHNICA, Sept. 22, 2010.

authors and artists, and the U.S. economy as a whole.”¹⁷ In response to these assertions, the Task Force has identified a “public policy imperative ... to combat online copyright infringement more effectively.” The strength of the response to this “public policy imperative” turns in large measure on the accuracy of the claims of the harm caused by infringement, particularly the cost to the U.S. economy.

An assessment of the costs to the U.S. economy resulting from infringement must reflect analytical rigor that has been lacking in the studies produced to date by rightsholders.¹⁸ The burden of persuasion is on those who seek to increase the level of federal protection for IP. We do not doubt that infringement imposes costs on some companies and perhaps on the U.S. economy. However, as the Government Accountability Office recently stated that “it is difficult, if not impossible, to quantify the net effect of counterfeiting and piracy on the economy as a whole.”¹⁹ The GAO further stated that the “net effect” of infringement on the economy “cannot be determined with any certainty.”²⁰

Our questioning of the measures of the costs of infringement should not be interpreted as a condoning of infringement, or as a suggestion that rightsholders should not enforce their rights to the fullest extent permitted under existing law. Rather, our position is that the IP laws should not be amended, and additional federal resources should not be devoted to improving enforcement, with respect to a particular kind of infringement in the absence of unambiguous data concerning the cost of that kind of infringement to the American public. Federal resources

¹⁷ 75 Fed. Reg. at 61422 (Oct. 5, 2010).

¹⁸ See, e.g., Nate Anderson, *Oops: MPAA Admits College Piracy Numbers Grossly Inflated*, ARS TECHNICA, Jan. 22, 2008, <http://arstechnica.com/tech-policy/news/2008/01/oops-mpaa-admits-college-piracy-numbers-grossly-inflated.ars>; Julian Sanchez, *750,000 Lost Jobs? The Dodgy Digits Behind The War On Piracy*, ARS TECHNICA, October 8, 2008, <http://arstechnica.com/tech-policy/news/2008/10/dodgy-digits-behind-the-war-on-piracy.ars>.

¹⁹ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, INTELLECTUAL PROPERTY: OBSERVATION ON EFFORTS TO QUANTIFY THE ECONOMIC EFFECTS OF COUNTERFEIT AND PIRATED GOODS; THE IMPACT OF INNOVATION AND THE ROLE OF IP RIGHTS ON U.S. PRODUCTIVITY, COMPETITIVENESS, JOBS, WAGES AND EXPORTS, GAO-10-423 16 (2010) [hereinafter “GAO Report”].

²⁰ Id. at 28.

should not be expended on IP protection for the purpose of assisting a specific industry. Instead, the purpose must always be to benefit the public as a whole. Accordingly, the federal government should increase its intervention in the form of new legislation or enforcement only in areas where: 1) the infringement is unambiguous; 2) the harm to the public is clear; 3) industry is incapable of addressing the infringement; and 4) federal intervention is likely to have a positive impact.

The GAO's conclusion on the challenge of determining the economic harm caused by infringement flows from its identification of serious methodological flaws in the studies performed to date, particularly studies commissioned by rightsholder interests. These methodological flaws correspond to the fallacies identified below.

1. The Objectivity Fallacy

Studies urging more government enforcement that are put forth by constituencies that stand to benefit from that enforcement warrant more skepticism than studies put forth by disinterested observers, notwithstanding that these studies are conducted by economists. Previously, media investigations into the source of rightsholder industry statistics have found little or no basis for these numbers, dismissing them as "fiction."²¹ Objective analyses indicate that rightsholder-funded research has drastically overestimated counterfeiting and copyright infringement costs, such as a 2007 study by the Organization for Economic Co-operation and Development (OECD), which demonstrated that industry estimates overstated reality by a factor

²¹ See David Kravets, *Fiction or Fiction: 750,000 American Jobs Lost to IP Piracy*, WIRED, Oct. 3, 2008, available at <<http://www.wired.com/threatlevel/2008/10/fiction-or-fict/>>; see also Julian Sanchez, *750,000 lost jobs? The dodgy digits behind the war on piracy*, ARS TECHNICA, Oct. 7, 2008, available at <http://arstechnica.com/tech-policy/news/2008/10/dodgy-digits-behind-the-war-on-piracy.ars>. The most recent industry-commissioned "piracy" study, TERA Consultants, *Building a Digital Economy: The Importance of Saving Jobs in the EU's Creative Industries* (2010), has already been shown to rely on dubious assumptions and incomplete data. See Posting of Mike Masnick to Techdirt, <http://www.techdirt.com/> (Mar. 18, 2010, 07:00 EST).

of three.²² The GAO report quoted a 2008 OECD study that found that “data have not been systematically collected or evaluated and, in many cases, assessments ‘rely excessively on fragmentary and anecdotal information; where data are lacking, unsubstantiated opinions are often treated as facts.’”²³ The GAO added that “industry associations do not always disclose their proprietary data sources and methods, making it difficult to verify their estimates.”²⁴

At least as early as the mid-1990s, government officials reportedly acknowledged rightsholder-industries’ “varying degree of commitment to accuracy.”²⁵ Notwithstanding the dodgy pedigree of such data, however, they are proffered to regulatory agencies as a basis for action.²⁶ For example, federal officials have been repeatedly presented with the results of an undisclosed study whose inflated findings were revised downward under criticism,²⁷ or with other studies that depended upon this discredited research.²⁸

Nonetheless, members of Congress and executive branch officials persist in repeating these “statistics” in public *fora* as if they were verified facts. We are particularly disappointed that six months *after* the GAO questioned the reliability of industry reports of infringement, Attorney General Eric Holder in a speech in Hong Kong relied on software industry figures for

²² See Hugh Williamson, *Forgery Trade losses ‘under \$200bn’*, FIN. TIMES, May 7, 2007, available at <http://www.ft.com/cms/s/0/acbd064c-fcb9-11db-9971-000b5df10621.html>.

²³ GAO Report *supra* note 19 at 16.

²⁴ *Id.*

²⁵ PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM 98 (2002).

²⁶ See WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS 30-36 (Oxford 2009).

²⁷ See MPAA revises study on movie piracy, Jan. 23, 2008, L.A. TIMES, available at <http://articles.latimes.com/2008/jan/23/business/fi-download23>; see also Carrie Russell, *MPAA Admits Piracy Study Flawed*, COPYRIGHT ADVISORY NETWORK available at <http://librarycopyright.net/wordpress/?p=75>. The contents of the offending study apparently have been withheld from the public notwithstanding a Congressional request for the methodology and data. Compare *The Analog Hole: Can Congress Protect Copyright and Promote Innovation?*, Before the Senate Comm. on the Judiciary, 109th Cong. 15-16 (2006) with Gigi Sohn, *Congress Should Demand MPAA Data on the Cost of Piracy*, Jan. 23, 2008 available at <http://www.publicknowledge.org/node/1363>.

²⁸ See LECG, LLC, ECONOMIC ANALYSIS OF THE PROPOSED CACP ANTI-COUNTERFEITING AND PIRACY INITIATIVE 10 (2007) available at http://www.lexisnexis.com/documents/pdf/20080610072737_large.pdf [hereinafter LECG Study]; STEPHEN SIWEK, THE TRUE COST OF MOTION PICTURE PIRACY TO THE U.S. ECONOMY 2, 8, en.14, 18 (2006) available at [http://www.ipi.org/IPI/IPIPublications.nsf/PublicationLookupFullTextPDF/293C69E7D5055FA4862571F800168459/\\$File/CostOfPiracy.pdf?OpenElement](http://www.ipi.org/IPI/IPIPublications.nsf/PublicationLookupFullTextPDF/293C69E7D5055FA4862571F800168459/$File/CostOfPiracy.pdf?OpenElement) [hereinafter IPI Study] (citing MPAA study prepared by LEK).

the assertion that infringement around the world leads to \$50 billion in foregone revenue to the U.S. software industry.²⁹ He further relied on industry estimates for the claim that every dollar of lost revenue from infringed software translates into three dollars of revenues lost to IT support and distribution services.

2. The Lost Sale Fallacy

Rightsholders frequently produce studies contending that a certain number of infringements have occurred, and that each infringement constitutes a lost sale at full retail price.³⁰ Even if the methodology for arriving at the number of infringements were sound, the assumption that each infringement displaces a full price sale of an authorized copy is flawed. Many infringers, particularly those engaged in P2P file sharing, have limited resources, and could not afford to purchase even a small fraction of the content they download. We are not contending that none of these downloads displace sales at full retail price, just that the number of sales displaced could be far fewer than the rightsholders contend.³¹

The GAO report agreed that in the absence of real data on infringement, methods for calculating estimates of economic losses involve assumptions that have a significant impact on the resulting estimate. Two key assumptions are the rate at which a consumer is willing to switch from an infringing good to a genuine product (substitution rate); and value of the infringing good. The GAO suggested that assuming a one-to-one substitution rate at the manufacturer's

²⁹ Attorney General Eric Holder Speaks at the International Intellectual Property Summit (Oct. 18, 2010) <http://www.justice.gov/iso/opa/ag/speeches/2010/ag-speech-101018.html>.

³⁰ See, e.g., BUSINESS SOFTWARE ALLIANCE, SIXTH ANNUAL GLOBAL SOFTWARE PIRACY STUDY 18 (2008) available at <http://global.bsa.org/globalpiracy2008/studies/globalpiracy2008.pdf> ("Once we know the number of total units of software installed, the number of legitimate and pirated units of software installed, and the average system price for legitimate software, we calculate losses as follows: \$ Losses = # Pirated Software Units x Average System Price").

³¹ There is a growing body of economic literature that suggests that file sharing does not lead to a net loss of sales. See, e.g., Felix Oberholzer-Gee and Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. POL. ECON. 1 (2007) (concluding the effect of downloads on album sales is "statistically indistinguishable from zero"); see also Annelies Huygen et al., *Ups and Downs: Economic and Cultural Effects of File Sharing on Music, Film and Games* (2009). We are not in a position to assess the validity of these studies. However, the IPEC must consider them in the course of developing the Joint Strategic Plan.

suggest retail price could lead to a dramatic overstatement of economic loss. The GAO noted that some copyright industry studies made precisely this problematic assumption.³² In other instances, the studies failed altogether to reveal their assumptions.³³ The GAO stated that “[u]nless the assumptions about substitution rates and valuations of counterfeit goods are transparently explained, experts observed that it is difficult, if not impossible, to assess the reasonableness of the resulting estimate.”³⁴

3. The Causation Fallacy

Perhaps recognizing the existence of the Lost Sale Fallacy, rightsholders often indicate that their sales have decreased from a certain point in time and attribute that decrease in sales to infringement. Similarly, job losses in a given industry are attributed to infringement. While there may be a correlation between decreased sales and jobs on the one hand, and the rise of file sharing on the other, correlation is not causation.

For example, there are many factors that may have contributed to the drop in the sales of compact discs (CD) over the past decade.

- Sales of CDs were artificially high in the late 1990s as consumers were converting their record collections from other formats, principally cassettes, to CDs. Once they completed this conversion, their rate of purchasing CDs dropped.³⁵
- The increased popularity of the iPod and other MP3 players has caused consumers to migrate away from the purchase of ten or more songs bundled together on a CD to the

³² GAO Report *supra* note 19, at 21 (referring to a Business Software Alliance survey).

³³ *Id.* (referring to a Motion Picture Association survey).

³⁴ *Id.* at 18.

³⁵ See SEUNG-HYUN HONG, *The Effect of Napster on Recorded Music Sales: Evidence from the Consumer Expenditure Survey* 23-28 (Stanford Institute for Economic Policy Research Discussion Paper No. 03-18, 2004) available at <http://www.stanford.edu/group/siepr/cgi-bin/siepr/?q=system/files/shared/pubs/papers/pdf/03-18.pdf>; Oberholzer-Gee & Strumpf, *supra* note 31.

purchase of individual songs via legitimate e-commerce platforms, such as the Apple iTunes store.³⁶

- CDs now compete with a range of attractive new entertainment products, including DVDs and video games. These other products have seen significant growth in recent years, just as consumer spending on CDs declined.³⁷
- A decade ago a set of very popular new performers emerged on the music scene, including Britney Spears, Christina Aguilera, 'N Sync, and the Backstreet Boys. Industry data suggests that there has not been a similar convergence of popular new acts since then.³⁸
- The booming economy of the 1990s stimulated consumer demand that could not be sustained during the two recessions of the past decade.

This last point underscores a basic contradiction in the economic arguments made by the entertainment industries. Their works receive copyright protection because they are creative; indeed, the purpose of the copyright law is to promote creativity. But creative works are highly

³⁶ *Album Sales Plunge, Digital Downloads Up*, ASSOCIATED PRESS, Jan. 1, 2009, available at <http://www.msnbc.msn.com/id/28463074/> (noting Nielsen Soundscan report for 2008 record sales “continues a troubling trend for the recording industry, which has a harder time maintaining profits when consumers buy single songs instead of albums.”).

³⁷ See, e.g., Charles Arthur, *Are Downloads Really Killing The Music Industry? Or Is It Something Else?*, THE GUARDIAN, June 9, 2009, <http://www.guardian.co.uk/news/datablog/2009/jun/09/games-dvd-music-downloads-piracy> (showing decline in music sales offset by DVD and video game sales for an overall increase in entertainment spending). In addition to digital singles and DVDs, new music streaming services such as Pandora and Last.fm may be cannibalizing demand for albums. See also Ben Sisario, *Albums by Swift and Boyle Top 2009 Charts, as Sales Continue Plunge*, N.Y. TIMES, Jan. 6, 2010, available at <http://www.nytimes.com/2010/01/07/arts/music/07sales.html> (quoting NPD Group analyst saying, “One of the things we’re seeing as people start using Pandora, MySpace Music and other access models is that there is a clear cannibalistic effect on how many tracks they purchase on iTunes. They go to iTunes, find the Pandora app, and then buy a third less songs.”).

³⁸ Billboard declared Spears the second-best selling artist of the 2000s, and yet the vast majority of her sales were in the first half of the decade. Britney Spears Biography and Awards, <http://www.billboard.com/artist/britney-spears/bio/290150#/artist/britney-spears/bio/290150>. At the same time, data suggest that sales to customers over 36 lagged in 2002 because they simply did not like what was being offered. Press Release, The NPD Group Declining Music Sales: It's Not All Digital Downloading (June 5, 2003) available at http://www.npd.com/press/releases/press_030605.htm. Subsequent CD sales for artists targeted at this older demographic have been record-setting. Ben Sisario, *Susan Boyle, Top Seller, Shakes Up CD Trends*, N.Y. TIMES, December 2, 2009, available at <http://www.nytimes.com/2009/12/03/arts/music/03sales.html>.

susceptible to popular whims; demand for a particular album or film or video game can rise or fall literally overnight. Moreover, the revenues of companies in the entertainment industries typically are driven by a small number of hits. The ticket sales of *Avatar*, for example, have generated \$2.6 billion in revenue worldwide,³⁹ compared to total revenues of \$8.7 billion for the previous quarter for all of 20th Century Fox parent company News Corp.⁴⁰ Notwithstanding the inherent volatility of the demand for their products, the entertainment industries believe that the market should treat their products as fungible commodities, with demand rising steadily as population increases. If demand drops, they attribute the drop to infringement rather than the desirability of their products or macroeconomic factors.

The causal link between infringement and job loss is even more elusive. The number of Americans employed in certain IP industries may have decreased, but many factors other than infringement may have contributed to this. Some industries have replaced workers with technology. Other industries, notably publishing and motion pictures, have moved jobs overseas.⁴¹ We have also just experienced the worst recession since the Great Depression, which has resulted in layoffs in many industries. There is no evidence that the IP industries have been harder hit than other industries by virtue of infringement.

4. The Innovation Fallacy

A. Incentives to Innovation

³⁹ *Avatar* (2009) – Box Office Mojo, <http://www.boxofficemojo.com/movies/?id=avatar.htm>

⁴⁰ Ben Fritz & Dawn C. Chmielewski, *News Corp. Revenue Up 10%, Fox Operating Income Nearly Triples*, L.A. TIMES, Feb. 2, 2010, <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/02/news-corp-revenue-up-10-fox-operating-income-nearly-triples.html>. *Avatar*'s earnings buoyed more than just NewsCorp; they were sufficient to give IMAX a box-office-to-date of \$187 million so far in 2010, compared to \$14 million at the same point in 2009. Matt Egan, *'Avatar' Carries IMAX to 98% Revenue Jump*, FOX BUSINESS, Mar. 11, 2010, <http://www.foxbusiness.com/story/markets/industries/entertainment/avatar-carries-imax--revenue-jump/>.

⁴¹ For an account of how the sound recording industry has changed in recent years in ways that likely cause the industry to shrink, including shifting manufacturing jobs overseas and requiring fewer staff for production and A&R, see Adam Frucci, *Record Labels: Change or Die*, GIZMODO, Mar. 11, 2010, <http://gizmodo.com/5481545/record-labels-change-or-die>.

In addition to asserting that infringement depresses sales and jobs, rightsholders contend that infringement harms the economy by discouraging innovation. This argument is qualitative rather than quantitative, because it is incapable of proof quantitatively. Intuitively, it makes sense that that without any IP protection, certain forms of inventive activity might not occur. If films could be copied with impunity, and studios could never recover the cost of production, studios would produce few, if any films.

But the fact that certain works or inventions may need some protection to ensure their creation does not inform policy makers about the necessary length of the term of protection. If a film studio on average recovers the cost of production in the first three years after the release of a film, why should it receive protection for 95 years? Similarly, if a computer hardware manufacturer recovers the cost of developing a component in the first year it is on the market, what are the economic consequences when the relevant patent lasts 20 years? If the copyright in the film is infringed after the studio has recovered all the costs of production, the infringement does not discourage innovation. Likewise, if the patent in the component is infringed after the computer manufacturer has recovered its development costs, the infringement does not act as a “tax” on innovation.

Moreover, the need for at least a minimal level of protection does not inform policy-makers of the appropriate form of protection. The software industry flourished for decades with just copyright protection for computer programs; courts permitted the issuance of software patents only after the industry was well established. There is limited no evidence that providing software with patent protection in addition to copyright protection has promoted innovation that otherwise would not have occurred, and at least some evidence to the contrary.⁴²

⁴² See James Bessen & Michael J. Meurer, *Patent Failure* 188-193 (2008). The EU Database Directive demonstrates that more protection does not necessarily lead to more innovation. In 1996, the European Union

Additionally, there are many industries where competition and consumer demand, rather than intellectual property, provides the incentive for innovation.⁴³ These include the furniture, clothing,⁴⁴ and financial services industries. To be sure, companies in these industries rely heavily on their trademarks to differentiate themselves from their competitors and to establish reputations for quality and reliability. But innovation in their products has occurred notwithstanding the absence of copyright or patent protection.⁴⁵

The focus on the incentive to innovation provided by intellectual property undervalues the innovation driven by academic research, which often is government funded. An analysis of the 300 most influential innovations in science, commerce, and technology revealed that collaborative academic environments generated more world-changing ideas than the competitive sphere of the marketplace.⁴⁶

adopted *sui generis* protection for the investment in the assembly of facts in databases. The EU's objective was to increase its global market share of this important industry relative to the United States, which does not provide a similar form of protection. In 2005, the European Commission performed a study on the effectiveness of the Directive. The study found that since the adoption of the Directive, the European share of the global database market had actually decreased. The Commission concluded that the Directive did not have a positive impact on database creation. See DG Internal Market and Services Working Paper, "First evaluation of Directive 96/9/EC on the legal protection of databases," Dec. 12, 2005 (*available at*

http://www.europa.eu/comm/internal_market/copyright/docs/databases/evaluation_report_en.pdf).

⁴³ A May 11, 2010 announcement by the Federal Trade Commission, the Department of Justice, and the Patent and Trademark Office of a joint workshop stated: "In recent years, federal agencies and the courts have recognized that patents and competition share the overall purpose of promoting innovation and enhancing consumer welfare. Timely, high-quality patents promote investment in innovation. The competitive drive of a dynamic marketplace fosters the introduction of new and improved products and processes. By contrast, delay, uncertainty, and poor patent quality can create barriers to innovation. Additionally, where standards for violating antitrust law are unclear, or where the threshold for antitrust violations is set too low or too high, innovation can be stifled. The workshop will address ways in which careful calibration and balancing of patent policy and competition policy can best promote incentives to innovate."

⁴⁴ See Christopher Jon Sprigman & Kal Raustiala, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006) (*available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=878401&rec=1&srcabs=986891 (arguing that fashion "operates within a low-IP equilibrium in which copying does not deter innovation and may actually promote it")).

⁴⁵ Indeed, open source software demonstrates that even with copyrightable subject matter, the expectation of monetizing creative effort through copyright protection may not be necessary provide an individual entity with an incentive to innovate. To the contrary, with open source software, copyright acts as the mechanism to *prevent* a single entity from appropriating the value of the innovation. Innovation nonetheless occurs through collaborative development enabled by the Internet. And developers of open source software derive significant revenue from selling their services, rather than their software.

⁴⁶ STEVEN JOHNSON, *Where Good Ideas Come From: The Natural History of Innovation* (2010).

B. IP Protection Chilling Innovation

The rightholders' argument that infringement discourages innovation also overlooks the ways in which excessive IP protection can inhibit innovation. As noted above, "[n]othing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each creator building on the works of those who came before. Overprotection stifles the very creative force it's supposed to nurture."⁴⁷ Every year that an invention is covered by a patent is a year that competing scientists and engineers can't build on that invention. If a company recovers all its development costs in a patent's first five years, society as a whole is deprived of 15 years of follow-on innovation while that company accumulates profits. In this sense, IP beyond the absolute minimum necessary to incentivize innovation is a dead weight loss to the economy.⁴⁸

An additional dead-weight loss is imposed by defects in the IP litigation system. For the past five years, as part of its patent reform effort, Congress has been considering amendments relating specifically to patent litigation.⁴⁹ Issues discussed include the apportionment of damages, the standards for willful infringement, forum shopping, and interlocutory appeals from *Markman* hearings. The debate has revealed that the patent system affects different industries in different ways. The pharmaceutical and biotechnology industries, which historically have relied heavily on patent protection, are generally satisfied with the *status quo*. In contrast, the information technology and financial services sectors, which have been less reliant on patent

⁴⁷ *White v. Samsung Electronics of America, Inc.*, 989 F.2d 1512, 1513-16 (9th Cir.) (Kozinski, J., dissenting), cert. denied, 113 S. Ct. 2443 (1993). See also WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 326-27 (2003) ("There is also evidence that the patenting of computer software actually retards innovation because most software innovation both builds on and complements existing software. Without the retardation introduced by patenting and the resulting need to negotiate licenses, software manufacturers would innovate more rapidly and each would benefit from the others' innovations, which, because of the sequential and complementary nature of the innovations in this industry, would enhance the value of the existing products.")

⁴⁸ The lengthy copyright term also imposes such a dead weight loss, particularly with respect to orphan works. See discussion of orphan works in Section III.7.C., *infra*.

⁴⁹ See Patent Reform Act, S. 515, S. 610, H.R. 1260, 111th Cong. (2009).

protection, believe that the patent system is being abused by some non-practicing entities (also known as patent trolls). Additionally, a typical computer hardware or software product may implicate thousands of patents, which magnifies the potential for patent troll abuse.⁵⁰

Accordingly, the information technology and financial services sectors believe that the rules currently governing patent litigation act as an impediment to innovation.

Innovation is also chilled by the statutory damages permitted in copyright infringement cases. Under 17 U.S.C. § 504, a plaintiff can obtain up to \$30,000 in damages for each work infringed, regardless of the actual injury it suffered. In cases involving willful infringement, the statutory damages can rise to \$150,000 per work infringed. Because cases involving digital technologies often implicate hundreds, if not thousands, of works, providers of information technology products and services face truly astronomic damages liability.⁵¹ The threat of enormous damages encourages rightsholders to assert aggressive theories in the hope of coercing quick settlements.⁵² The threat of enormous damages also causes technology companies to withhold new products and services from the market.⁵³

⁵⁰ Justice Kennedy recognized these trends in his concurring opinion in *eBay, Inc. v. MercExchange L.L.C.*, 547 U.S. 388, 396-97 (2006) (Kennedy, J., concurring)(citations omitted):

An industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees. For these firms, an injunction, and the potentially serious sanctions arising from its violation, can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent. When the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest. In addition injunctive relief may have different consequences for the burgeoning number of patents over business methods, which were not of much economic and legal significance in earlier times. The potential vagueness and suspect validity of some of these patents may affect the calculus under the four-factor test.

⁵¹ See Pamela Samuelson, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009).

⁵² The Las Vegas Review Journal transferred the copyrights in its articles to Righthaven, which in turn has sued bloggers for reposting as little as five sentences from these articles. Righthaven is half owned by the intellectual property attorney suing the bloggers. As of November 17, 2010, Righthaven had filed 173 infringement suits, and reached settlements in 73, yielding an estimated \$255,000. See www.righthavenlawsuits.com.

⁵³ The potential for large statutory damages can discourage authors from exploiting their own works. A 1965 book contract between an author and a publisher, for instance, may not address whether the author or the publisher has the

It should be noted that when the PRO-IP Act was introduced in the House, it included a provision that actually would have increased statutory damages for compilations. In other words, it would have made a bad situation even worse – the possible statutory damages for infringing a CD with ten tracks would have increased from \$150,000 to \$1.5 million. Fortunately, this provision was stripped out of the House bill. But the underlying problem remains. The potential liability for huge statutory damages confronts not only the person who actually engages in the infringing conduct, but also the provider of the technology and services that enables the infringement.

The dead-weight loss resulting from overprotection of IP permeates the economy. In some areas, such as software or business method patents, this loss may be greater than others. Any effort to quantify the amount of innovation caused by IP must also account for the amount of innovation prevented by IP.

C. The Chamber Study

A study recently released by the U.S. Chamber of Commerce reflects the innovation fallacy. The study reviewed the performance of “IP-intensive industries” in the United States between 2000 and 2007. The study found that IP intensive industries, defined as industries with high research and development spending and employed scientists, outperformed non-IP intensive industries in terms of job creation, sustained growth, exports, and wages. Based on this finding, the Chamber study concluded that “the creation of intellectual property is the key factor in sustaining economic growth.”⁵⁴ The Chamber study further concluded that “[p]olicies that

rights for digital distribution. The possibility of large statutory damages prevents either the author or the publisher from taking the risk of distributing the book digitally.

⁵⁴ NAM PHAM, *The Impact of Innovation and the Role of IP Rights on U.S. Productivity, Competitiveness, Jobs, Wages and Exports* 52 (2010).

enhance law enforcement's ability to detect, investigate, and prosecute IP theft are essential for better protecting intellectual property rights and thereby promoting further innovation.”⁵⁵

In reaching its conclusions, the Chamber study made two questionable assumptions. First, it assumed that the success of the IP-intensive industries could be attributed to the existence of intellectual property. The study, however, produced no evidence that IP protection was “the key factor” in the success of these industries. Even if one accepts that innovation contributed to these industries' success by enabling them to offer consumers new products at low cost, there is no reason to assume that IP protection was the primary driver of this innovation.

Second, building on the previous assumption, the Chamber study assumed that more IP protection will lead to more innovation. But as discussed above, over-protection is as dangerous as under-protection. Too much protection prevents competition from follow-on innovation.⁵⁶ Balance between protection and competition is the salient feature of our IP system, and a major reason for our global leadership in the development of innovative technologies.

5. The Industry Size Fallacy

Rightsholders attempt to demonstrate the threat infringement poses to the economy by showing the size of their industries and their contribution to the economy in terms of revenue and jobs.⁵⁷ But the size of their industries in no way proves the seriousness of the infringement problem. If anything, it suggests the opposite. Large, healthy industries are better able to withstand challenges and adjust to new circumstances than small, weak ones. If one accepts its contentions, the Chamber study discussed above amply demonstrated that the IP-intensive

⁵⁵ *Id.* at 53.

⁵⁶ See Simon Waterfall, *Investigation: Apple vs Nokia vs Google vs HTC vs RIM*, WIRED.CO.UK (May 12, 2010), for a discussion of how the “patent thicket” on smartphones is causing litigation and impeding innovation in the smartphone industry.

⁵⁷ See, e.g., STEPHEN SIWEK, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY (2009) available at <http://www.ei.com/IIPASiwekReport2003-07.pdf> (prepared for the International Intellectual Property Alliance).

industries are out-performing the rest of the economy. This success suggests that these industries do not need increased federal law enforcement assistance.⁵⁸ Regardless, this methodology is flawed. Their figures for the “copyright industries” include Internet search engines and service providers that rely as much on fair use and other exceptions and limitations as they do on intellectual property rights themselves, and are not calling for increased federal assistance.

Finally, any accounting of the contribution of the IP industries to the U.S. economy must also consider the economic contribution of industries relying on fair use and copyright’s other exceptions and limitations. On April 27, 2010, the Computer & Communications Industry Association released a study it commissioned on the contribution of fair use to the U.S. economy.⁵⁹ The CCIA study, performed by Thomas Rogers and Andrew Szamosszegi of Capitol Trade, Inc., employed the WIPO methodology for measuring the contribution of a given industry to a particular country’s economy. After defining industries dependent on fair use and other exceptions and limitations to copyright, the study measured those industries’ contributions in terms of revenue, value added, employment, and international trade. It found that companies benefiting from limitations on copyright-holders’ exclusive rights generated revenue of \$4.7 trillion in 2007 – a 36 percent increase over 2002 revenue of \$3.4 trillion. The most significant growth over this period was in Internet publishing and broadcasting, web search portals, electronic shopping, electronic marketplaces and other financial investment activity. Fair use

⁵⁸ In comments submitted to the IPEC, the Copyright Alliance similarly cited statistics that cast doubt on the need for an increased level of IP protection: Expenditures on books, recorded audio, and video media grew in current dollars from \$108 billion in 1998 to \$169 billion in 2007, a 44% growth rate. Copyright Alliance Comments at 6. The online music industry grew by 27% in 2009. *Id.* at 8. Core copyright sales in foreign markets increased by 8% from 2006 to 2007. *Id.* at 10. Between 2000 and 2005, creative industries achieved an annual growth rate in international trade of 8.7%. *Id.* The number of U.S. independent artist-entrepreneurs increased from 509,000 in 2000 to 680,000 in 2007. *Id.* The number of professionals belonging to arts unions in the U.S. increased by 26.4% between 2004 and 2008. *Id.* at 12. There was a 33.6% increase in individual artists in the U.S. from 2000 to 2007. *Id.* Royalties for the performance of musical compositions increased 20% between 2003 and 2008. *Id.* This robust growth indicates that federal dollars are better spent elsewhere.

⁵⁹ Thomas Rogers and Andrew Szamosszegi, COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION, *Fair Use in the U.S. Economy: The Economic Contribution of Industries Relying on Fair Use* (2010).

industry value added in 2007 was \$2.2 trillion, 16.2% of the total U.S. current value GDP. As for jobs, employment in fair use industries grew from 16.9 million in 2002 to 17.5 million in 2007. According to the study, one out of every eight U.S. workers is employed by a company that benefits from protections provided by fair use. Industries relying on fair use and other copyright exceptions make up one-sixth of the U.S. economy.

The CCIA study stated: “the protection afforded by fair use has been a major contributing factor to these economic gains, and will continue to support growth as the U.S. economy becomes even more dependent on information industries.”⁶⁰ The CCIA study’s conclusion that fair use is “a major contributing factor” to the success of the fair use industries is far more supportable than the Chamber study’s conclusion that intellectual property protection is “the key factor” in the success of IP-intensive industries. As discussed above, there is no compelling reason to accept the Chamber’s assumption that IP protection is essential for innovation in a given industry -- there are many reasons why a company might innovate regardless of the level of IP protection. In contrast, it is reasonable to assume that an industry that would be illegal but for an exception would not exist but for that exception. In other words, it is reasonable to assume that without the exception, the industry would face an onslaught of litigation from rightsholders whose IP the industry had allegedly infringed.

6. The Equivalence Fallacy

In their advocacy, rightsholders imply that all forms of IP infringement are equivalent from a legal, economic, and moral point of view. Congress, however, has made clear differentiations among different kinds of infringements.

A. Willful patent infringement vs. regular patent infringement

⁶⁰ *Id.* at 29.

Under 35 U.S.C. § 284, a court can award a plaintiff “damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer....” However, in cases involving willful infringement, the court can “increase the damages up to three times the amount found....” The Federal Circuit in *In re Seagate Technology, LLC*, stated that to prove willfulness, the patentee must show that “the infringer acted despite an objectively high likelihood that its actions constituted infringement,” and that this risk “was either known or so obvious it should have been known to the accused infringer.”⁶¹

B. Counterfeiting vs. trademark infringement

In an ordinary trademark infringement action, the trademark owner can recover only the defendant’s profits and the damages it sustained.⁶² However, the court must treble the damages if it finds that the infringer intentionally used a mark knowing that the mark was a counterfeit mark.⁶³ In cases involving counterfeit marks, the trademark owner can elect to receive statutory damages instead of actual damages. The statutory damages range from \$500 to \$100,000 per counterfeit mark per type of goods or services sold.⁶⁴ If the court finds that the use of the counterfeit mark was willful, the court can increase the statutory damages to \$1,000,000 per counterfeit mark.⁶⁵ Under 15 U.S.C. § 1117(d), statutory damages from \$1,000 to \$100,000 are also available in cybersquatting cases.

The U.S. Code does not contain criminal penalties for trademark infringement. However, a person who knowingly uses a counterfeit mark in connection to goods or services in which he

⁶¹ *In re Seagate Technology, LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007).

⁶² 15 U.S.C. § 1117(a).

⁶³ 15 U.S.C. § 1117(b). The Lanham Act draws a clear distinction between trademark infringement and counterfeiting. Compare 15 U.S.C. § 1114(1) with 15 U.S.C. § 1116(d)(1)(B).

⁶⁴ 15 U.S.C. § 1117(c)(1).

⁶⁵ 15 U.S.C. § 1117(c)(2).

intentionally traffics can be fined up to \$2 million and imprisoned for ten years.⁶⁶ If he is a repeat offender, the fine increases to \$5 million and the period of imprisonment to 20 years.⁶⁷ The period of imprisonment similarly increases to 20 years if the offender, through his counterfeiting, knowingly or recklessly causes serious bodily injury.⁶⁸ A penalty of life imprisonment can be imposed if the offender knowingly or recklessly causes death.⁶⁹ Additional penalties for the trafficking in counterfeit labels are set forth in 18 U.S.C. § 2318.

C. Willful Copyright Infringement vs. Regular Copyright Infringement vs. Innocent Infringement

Under 17 U.S.C. § 504(c)(1), a court can award statutory damages for each work infringed “in a sum not less than \$750 or more than \$30,000 as the court considers just.” When the court finds willful infringement, the court has the discretion to increase the award to \$150,000 per work infringed. On the other hand, when the court finds that the “infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright,” the court has the discretion to reduce the award of statutory damages to \$200. Moreover, the court can remit statutory damages altogether in specified situations if the infringer was a library, archives, educational institution or public broadcaster that “believed and had reasonable grounds for believing” that its use was a fair use.

The Copyright Act also allows criminal prosecution of willful infringement committed:

- a) for purposes of commercial advantage or private financial gain; b) by the reproduction or distribution of copies with a total retail value of more the \$1,000; or c) by distribution of a work being prepared for commercial distribution, by making it available to the public on a computer network, where the distributor knew or should have known that the work was intended for

⁶⁶ 18 U.S.C. § 2320(a)(1).

⁶⁷ *Id.*

⁶⁸ 18 U.S.C. § 2320(a)(2)(A).

⁶⁹ 18 U.S.C. § 2320(a)(2)(B).

commercial distribution.⁷⁰ Under 18 U.S.C. § 2319, the criminal penalties vary depending on the value of the copies made and whether the offense is a repeat offense. The maximum period of imprisonment is ten years.

Criminal penalties are also available for the unauthorized fixation of and trafficking in sound recordings of live musical performances⁷¹ and the unauthorized recording of motion pictures in movie theatres.⁷²

D. Willful vs. Ordinary vs. Innocent DMCA Violations

As discussed further in Section III.1.A below, the Digital Millennium Copyright Act (DMCA) recognizes degrees of culpability for violations of its prohibitions on the circumvention of technological protection measures (§ 1201) and the removal of copyright management information (§ 1202). For each violation of § 1201, the plaintiff can recover statutory damages in a sum between \$200 and \$2500 per act of circumvention, device, product, component, offer or performance of service. For each violation of § 1202, the plaintiff can recover statutory damages in a sum between \$2,500 and \$25,000. For repeat violations of §§ 1201 and 1202, “the court may increase the award of damages up to triple the amount that otherwise would be awarded....” On the other hand, the court can reduce or remit the award of actual or statutory damages if the court finds “that the violator was not aware and had no reason to believe that its acts constituted a violation.”

The DMCA provides for criminal prosecution of a person who violates §§ 1201 and 1202 “willfully and for purposes of commercial advantage or private financial gain.” The penalty for a first offense is a fine of up to \$500,000 and imprisonment of not more than five

⁷⁰ 17 U.S.C. § 506.

⁷¹ 18 U.S.C. § 2319A.

⁷² 18 U.S.C. § 2319B.

years. For a second offense, the fine can increase to \$1,000,000 and the period of imprisonment can increase to not more ten years.

This quick review of the remedies contained in the U.S. Code for different kinds of infringement demonstrates that Congress has made explicit determinations concerning the seriousness of various infringements.⁷³ The most basic distinction is between willful and non-willful infringement. The rightsholder can receive enhanced damages for willful patent and copyright infringement, DMCA violations, and counterfeiting. Willful copyright infringement, DMCA violations, and counterfeiting can also lead to criminal sanctions.

Although willful infringement across the board receives greater penalties than non-willful infringement, the remedies for counterfeiting are in a class by themselves. While statutory damages for willful copyright infringement can reach \$150,000 per work infringed, the statutory damages for willful counterfeiting are \$1 million per mark. A repeat copyright infringer can be imprisoned for ten years, but a repeat counterfeiter can be imprisoned for twice as long. Moreover, a counterfeiter can be sentenced to twenty years imprisonment if he causes serious bodily harm, or life imprisonment if he causes death.

At the other end of the spectrum, innocent copyright infringers and DMCA violators can have their statutory damages liability reduced significantly or remitted altogether.

In sum, Congress has created a very clear hierarchy of infringement cases, in decreasing order of seriousness:

- 1) Counterfeiting cases causing serious bodily harm or death;
- 2) Willful counterfeiting;

⁷³ The U.S. Code also prohibits economic espionage. If a person knowingly steals trade secrets, the person can be sentenced to imprisonment for 10 years. 18 U.S.C. § 1832. If the person steals the trade secrets for the benefit of a foreign government, the person can be fined \$500,000 and imprisoned for 15 years. 18 U.S.C. § 1831. The Economic Espionage Act does not provide for a private right of action.

- 3) Willful copyright infringement and DMCA violations for purposes of commercial advantage or private financial gain;
- 4) Willful patent and copyright infringement and DMCA violations;
- 5) Ordinary patent, trademark, and copyright infringement and DMCA violations;
and
- 6) Innocent copyright infringement and DMCA violations.

E. The Complexity of Infringement Litigation

Congress's decision to impose lighter penalties on ordinary infringement than on willful infringement reflects the understanding that ordinary infringement cases involve extremely complex legal issues with unpredictable judicial resolutions.

In a copyright infringement action, a plaintiff must show that the defendant had access to and made use of her work. But even if the plaintiff can make this showing, she is still a long way from prevailing. The plaintiff must then show that the defendant's use infringed one of the exclusive rights granted under the Copyright Act – reproduction, distribution, preparation of derivative works, public performance, or public display. Courts have struggled with the application of these concepts to digital technology. Courts have found that software temporarily stored in the random access memory of a computer was sufficiently fixed to constitute a copy under the Copyright Act.⁷⁴ More recently, however, the Second Circuit held that a buffer copy that lasted 1.2 seconds was not sufficiently fixed to meet the Copyright Act's definition of copy.⁷⁵ Similarly, the Fourth Circuit found that content stored temporarily on a server while it was in transit from the sender to the recipient was not fixed.⁷⁶ Courts have also had to wrestle

⁷⁴ See, e.g., *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993).

⁷⁵ *Cartoon Network LP LLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2890 (2009).

⁷⁶ *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F. 3d 544 (4th Cir. 2004).

with whether a link to a site constitutes a display of that site,⁷⁷ whether a cell phone ringing in public constituted a public performance of the ring tone on the cell phone.⁷⁸

Assuming that the plaintiff can show that the defendant reproduced, distributed, or performed elements of the plaintiff's work, the plaintiff must show that those elements contained "expression" covered by the Copyright Act. The distinction between protected expression and unprotected ideas and processes – the idea/expression dichotomy – is as metaphysical as the nonobviousness standard in patent law. Many copyright cases involve the copying of non-literal elements, and the court must determine on which side of the idea/expression line these non-literal elements fall. In the 1980s and 1990s, for example, courts struggled with the protectability of the structure of computer programs and interfaces specifications – the rules by which computer program interconnect. Companies developed new programs that performed the same function as existing software, and that ran on existing operating systems, but did so with independently written lines of code. The dominant companies sued the new entrants for copyright infringement, and the courts had to wade into the intricacies of software engineering to understand what the new entrants did and did not copy. The courts ultimately fashioned a rule that copyright did not protect interfaces specifications or other program elements dictated by considerations of interoperability or efficiency. By limiting the scope of copyright protection, the courts encouraged the development of interoperable computer products. This in turn led to the competition and innovation in the global information technology industry, and the rapid expansion of the Internet.⁷⁹

⁷⁷ *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

⁷⁸ *In re Application of Cellco Partnership*, 663 F.Supp.2d 363 (S.D.N.Y. 2009).

⁷⁹ See JONATHAN BAND AND MASANOBU KATOH, *INTERFACES ON TRIAL 2.0*, <http://www.policybandwidth.com/interfaces.html>; JONATHAN BAND AND MASANOBU KATOH, *INTERFACES ON TRIAL, INTELLECTUAL PROPERTY AND INTEROPERABILITY IN THE GLOBAL SOFTWARE INDUSTRY* (Westview Press 1995).

Courts similarly have had to examine the protectability of compilations of facts. In 1991, in a case involving the white pages of a telephone directory, the Supreme Court ruled that under copyright law, “only the compiler’s selection and arrangement may be protected; the raw facts may be copied at will.”⁸⁰ The Court stressed that it had “long recognized that the fact/expression dichotomy limits severely the scope of protection in fact-based works.”⁸¹ The Court observed that

It may seem unfair that much of the fruit of the compiler’s labor may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not ‘some unforeseen byproduct of a statutory scheme.’ It is rather, ‘the essence of copyright’ and a constitutional requirement. The primary objective of copyright is not to reward the labor of authors, but to ‘promote the Progress of Science and useful Arts.’ To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.... This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.⁸²

But even this unambiguous, unanimous ruling has not resolved all questions concerning the reuse of facts. Courts have recognized a distinction between “discovered facts,” which do not receive copyright protection, and “created facts,” which can.⁸³

Assuming a court finds that a defendant used protectable expression, the defendant incurs liability only if the court finds that none of the Copyright Act’s many defenses apply. The broadest and most flexible privilege is the fair use doctrine, codified at 17 U.S.C. § 107. Like the idea/expression dichotomy, fair use is one of copyright law’s “built-in First Amendment accommodations.”⁸⁴ The Supreme Court has described fair use as “an equitable rule of reason

⁸⁰ Feist Publications, Inc. v. Rural Telephone Serv. Co., Inc., 499 U.S. 340, 349-50 (1991).

⁸¹ *Id.* at 350.

⁸² *Id.* (citations omitted).

⁸³ New York Mercantile Exchange, Inc. v. Intercontinental Exchange, Inc., 497 F.3d 109 (2d Cir. 2007); Justin Hughes, *Created Facts and the Flawed Ontology of Copyright Law*, 83 NOTRE DAME L. REV. 43 (2007).

⁸⁴ Eldred v. Ashcroft, 537 U.S. 186, 219 (2003).

which permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”⁸⁵

Many fair use cases involve the use of less than the rightsholder’s entire work. One case concerned a magazine quoting fewer than 400 words from President Ford’s 655 page memoirs.⁸⁶ Other cases involve the uses of characters or settings from a novel,⁸⁷ part of a photograph,⁸⁸ or a few chords and lyrics from a song.⁸⁹ In some of these cases, the court has found fair use; in others, the court has found infringement.⁹⁰

Over the past twenty-five years, courts have found fair use in many cases involving the use of entire works:

- The Supreme Court permitted users to copy entire television programs for the purpose of time-shifting;⁹¹
- The Ninth and Federal Circuits allowed the copying and translation of entire computer programs in the course of reverse engineering for the purpose of identifying unprotected elements;⁹²
- The Ninth Circuit permitted the storage and display of compressed images by search engines;⁹³
- The Second Circuit allowed the reproduction and distribution of Grateful Dead posters in a coffee-table book;⁹⁴

⁸⁵ *Stewart v. Abend*, 495 U.S. 207 (1990).

⁸⁶ *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

⁸⁷ *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010), *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

⁸⁸ *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).

⁸⁹ *Campbell v. Acuff-Rose*, 510 U.S. 569 (1994).

⁹⁰ The court found fair use in *Acuff-Rose*, *Koons*, and *Suntrust*; the court found infringement in *Harper & Row v. The Nation*.

⁹¹ *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

⁹² *Atari Games Corp. v. Nintendo of America, Inc.*, 975 F.2d 832 (Fed. Cir. 1992); *Sega Enter. Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992); *Sony Computer Entm’t, Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Cir. 2000).

⁹³ *Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2002); *Perfect 10 v. Amazon*, 508 F.3d 1146 (9th Cir. 2007).

- The Fourth Circuit excused the copying of student papers in a database designed to detect infringement.⁹⁵

Copyright infringement litigation has also centered on the applicability of other defenses. The New York Times and other large publishers argued that a provision addressing the ownership of contributions to collective works, 17 U.S.C. § 201(c), permitted them to create and distribute digital versions of articles written for their publications by freelance writers.⁹⁶ The Supreme Court rejected this contention, resulting in the award of over \$16 million in damages to the freelance writers.⁹⁷ This case underscores that many disagreements relating to copyright are between the artists who create works and the large media companies that distribute the works.⁹⁸

Currently before the Supreme Court is a case regarding the proper interpretation of the first sale doctrine, 17 U.S.C. § 109(a). The first sale doctrine provides an exception to the distribution right to the owner of a copy “lawfully made under this title....” In essence, the first sale doctrine allows the owner of a legal copy to sell, gift, or lend that copy. The case before the Supreme Court involves the parallel importation of Omega watches. Omega manufactures the watches in Switzerland, and imports them to the U.S. through an authorized distributor. Costco, the discount retailer, discovered that it could purchase Omega watches in Switzerland for less than the authorized distributor was selling them in the U.S. Costco began selling in the U.S. the watches it purchased in Switzerland at a lower price than Omega’s authorized distributors. In response, Omega engraved a small logo for the back of the watch. When Costco imported and

⁹⁴ Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006).

⁹⁵ A.V. v. iParadigms, LLC, 562 F.3d 630 (4th Cir. 2009).

⁹⁶ Section 201(c) permits the owner of a copyright in a collective work to reproduce and distribute contributions to the collective work in “any revision of that collective work.” The New York Times and other publishers made available CDs and other electronic databases of previously published articles. The publishers claimed that they did not need to pay additional license fees to the freelance writers because the databases were “revisions” of the earlier collective works. The Supreme Court held that the databases were not revisions of the earlier collective works, but new collective works.

⁹⁷ New York Times Co. v. Tasini, 533 U.S. 483 (2001).

⁹⁸ See also Bouchat v. Baltimore Ravens, 619 F.3d 301 (4th Cir. 2010) (unauthorized use of logo).

sold the watches engraved with the logo, Omega sued for copyright infringement, alleging that Costco's importation and sale of the watches infringed Omega's distribution right in the copyrighted logo on the watches. Costco argued that the first sale doctrine provided it with an exception to Omega's distribution right in the logo. The Ninth Circuit, however, held that the phrase "lawfully made under this title" means lawfully manufactured in the United States.⁹⁹ Because Omega manufactured the watches with the logos in Switzerland, the first sale doctrine did not apply.

If the Supreme Court affirms the Ninth Circuit, the Court in effect will encourage companies to move their manufacturing overseas to avoid the application of the first sale doctrine. These companies would develop allegedly copyrighted content (of limited creativity and consumer value) to attach to those useful goods in order to assert copyrights over those goods. This may result in the loss of manufacturing jobs in the U.S. as well as higher prices to U.S. consumers, without any concomitant benefit from true innovation or creativity.

This case is the quintessential example of the policy complexities inherent in IP infringement cases, and demonstrates why the Task Force must not recommend increased federal intervention in the IP system in an undifferentiated manner. In this case, a finding of infringement will turn on a hyper-technical legal issue – the meaning of the phrase "lawfully made under this title;" and would result in preventing the sale of lawfully made goods, thereby harming U.S. consumers and workers, only to benefit a foreign rightsholder.¹⁰⁰

⁹⁹ Omega S.A. v. Costco Wholesale Corporation, 541 F.3d 982 (9th Cir. 2008).

¹⁰⁰ To the extent that the Task Force's report is directed towards improving the U.S. economy, it must be recalled that many of the largest rightsholders have foreign ownership: all four major record labels – Sony Music Entertainment (Japan), EMI (UK), Universal Music Group (Vivendi, France), Warner Music Group (Canada); two of the largest video games companies -- Nintendo (Japan), Sony (Japan); two of the six major film studios, Columbia Pictures (owned by Sony, Japan), NBC Universal (20% owned by Vivendi, France); two of the largest database publishers – Reed Elsevier (owner of Lexis-Nexis, UK-Netherlands), Thomson-Reuters (owner of West, Canada); many of the largest luxury goods manufacturers – Louis Vuitton (France), Hermes (France), Chanel

7. The Theft Fallacy

Rightholders allege that infringement constitutes theft of their property. The Supreme Court, however, has recognized that infringement is qualitatively different from crimes relating to tangible property such as theft or shoplifting. In *Dowling v. United States*, the Supreme Court explained:

The copyright owner ... holds no ordinary chattel. A copyright, like other intellectual property, comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections. “Section 106 of the Copyright Act confers a bundle of exclusive rights to the owner of the copyright,” which include the rights “to publish, copy, and distribute the author's work. However, “[t]his protection has never accorded the copyright owner complete control over all possible uses of his work.” For example, § 107 of the Copyright Act “codifies the traditional privilege of other authors to make ‘fair use’ of an earlier writer's work.” Likewise, § 115 grants compulsory licenses in nondramatic musical works. Thus, the property rights of a copyright holder have a character distinct from the possessory interest of the owner of simple “goods, wares, [or] merchandise,” for the copyright holder's dominion is subjected to precisely defined limits.

It follows that interference with copyright does not easily equate with theft, conversion, or fraud The infringer invades a statutorily defined province guaranteed to the copyright holder alone. But he does not assume physical control over the copyright; nor does he wholly deprive its owner of its use. While one may colloquially liken infringement with some general notion of wrongful appropriation, infringement plainly implicates a more complex set of property interests than does run-of-the-mill theft, conversion, or fraud.¹⁰¹

In addition to making clear that infringement is qualitatively different from a trespass on the possessory interest of the owner of tangible property, this passage stresses that IP is a “statutorily defined province,” “a series of carefully defined and carefully delimited interests.”

(France), Gucci (Italy); and six of the twelve largest pharmaceutical companies – Roche (Switzerland), GlaxoSmithKline (UK), Novartis (Switzerland), Sanofi-Aventis (France), AstraZeneca (UK), Bayer (Germany).

¹⁰¹ *Dowling v. United States*, 473 U.S. 207, 217-18 (1985) (citations omitted). Whereas taking a good from a possessor deprives the possessor of the ability to consume that good, the subject matter of intellectual property rights can be used by an infinite number of “rivalrous” users at one time. The theft of a rivalrous good is therefore economically distinct from the appropriation of a non-rivalrous entitlement. Infringement deprives a rightsholder not of possession nor application of the idea or expression at issue, but rather the opportunity to license its exclusivity. The non-rivalrous nature of idea consumption is hardly a novel economic theory; the phenomenon was noted by Thomas Jefferson in his oft-cited letter to Isaac McPherson. *See* Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813) (“[an idea’s] peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me”).

In other words, intellectual property is whatever Congress and the courts say it is, consistent with the Constitution.¹⁰² Congress and the courts can expand or contract the “province guaranteed” to the rightsholder. Thus, the financial loss a rightsholder may experience by virtue of infringement is a function of the breadth of the IP monopoly granted by the federal government in the first place. If Congress lengthens the copyright term by 20 years, the rightsholder whose term would have expired is suddenly “harmed” by infringement during this new term of protection. At the same time, but for the term extension, the rightsholder would not have suffered any harm.

Stated differently, in drafting IP statutes, Congress makes political judgments concerning the scope of intellectual property. Courts interpret these statutes when determining whether infringement occurred in a particular case. The extent of harm caused by the infringement flows directly from the courts’ interpretations of Congress’s political judgments.

8. The Silo Fallacy

Rightsholder assessments of the harm caused by IP infringement tend to look at these harms in isolation. The record industry may highlight declines in CD sales, but fails to mention the successes of other parts of the music industry, such as the revenue from digital downloads,¹⁰³ live performances¹⁰⁴ or television programs such as *American Idol*. When these revenues are included, the music industry as a whole remains highly profitable. To be sure, the four major

¹⁰² A unanimous Supreme Court in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), ruled that Section 43(a) of the Lanham Act did not create a cause of action for plagiarism – the use of an otherwise unprotected work or invention without attribution. The Court stated that “[t]o hold otherwise would be akin to finding that § 43(a) creates a species of perpetual patent and copyright, which Congress may not do.” *Id.* at 37. Writing for the Court, Justice Scalia stated that expanding the Lanham Act to cover plagiarism “would create a species of mutant copyright law that limits the public’s federal right to ‘copy and use’ expired copyrights.” *Id.* at 34. Similarly, Congress cannot enact legislation to overturn the Supreme Court’s ruling in *Feist v. Rural Telephone* that the Constitution prevents the copyrighting of facts: “any transparent ruse by Congress ... would also fall in the forbidden zone” of the Intellectual Property Clause. Justin Hughes, *How Extra-Copyright Protection of Databases Can be Constitutional*, 28 DAYTON L. REV. 159, 186 (2003).

¹⁰³ *Album Sales Plunge, Digital Downloads Up*, ASSOCIATED PRESS, Jan. 1, 2009, available at <http://www.msnbc.msn.com/id/28463074/>.

¹⁰⁴ Felix Oberholzer-Gee and Koelman Strumpf, *File-Sharing and Copyright* 20 (Harvard Business School, Working Paper No. 09-132, 2009) available at <http://www.hbs.edu/research/pdf/09-132.pdf>

record labels may not be benefiting from all these other revenue streams, but that is a function of the structure of the industry rather than copyright law. Moreover, although CD sales have declined since 2000, the number of albums created has increased significantly. In 2000, 35,516 albums were released; by 2007, this number had risen to 79,695.¹⁰⁵

Similarly, when film studios discuss the volume of illegal downloads and flat DVD sales, they omit reference to rising ticket sales to theatrical performances. They do not mention that the number of feature films released annually worldwide has increased from 3,807 in 2003 to 4,989 in 2007. (In the same period, the number of feature film releases in the U.S. rose from 459 to 590.)¹⁰⁶ The film studios also ignore ancillary income, such as the sale of \$16 billion of entertainment merchandise.¹⁰⁷ In this manner, they present policy makers with a skewed view of the health of their industry.¹⁰⁸

The software industry also remains robust,¹⁰⁹ and variations in the sale of proprietary software will not necessarily represent an industry increasingly employing open source licensing and service-driven business models. Likewise, the sales of luxury goods have risen as the economy emerges from the recession. Tiffany & Co., for example, quadrupled its fourth-quarter 2009 profit, compared to the last quarter of 2008.¹¹⁰

Additionally, the figures provided by the IP industries do not reflect the explosion of user generated content on the Internet. More people are creating and distributing essays (blogs),

¹⁰⁵ *Id.* at 23.

¹⁰⁶ *Id.* at 24.

¹⁰⁷ *Id.* at 20.

¹⁰⁸ Most recently, the MPAA trumpeted record box office receipts of \$29.9 billion in 2009, marking three straight years of solid growth and a 30% increase over 2005. Rob Pegoraro, *The MPAA Says the Movie Business Is Great. Unless It's Lousy*, WASHINGTON POST, March 11, 2010, available at http://voices.washingtonpost.com/fasterforward/2010/03/mpaa_box_office_bragging.html.

¹⁰⁹ See BUSINESS SOFTWARE ALLIANCE, RESILIENCE AMID TURMOIL: BENCHMARKING IT INDUSTRY COMPETITIVENESS 2009 6 (2009) (finding that while it has suffered from the recession, “the IT industry has been faring better than other sectors.”)

¹¹⁰ See *Tiffany Profit Soars on Glint of Spending*, WASHINGTON POST, March 23, 2010.

songs, and films than ever before in history. Moreover, thousands of individual programmers develop “apps” for the iPhone, Android OS, and other mobile devices, as well as participate in open-source software projects. This unprecedented democratization of the production and distribution of content demonstrates that the constitutional objectives of the IP system -- promoting the progress of science and the useful arts -- are still being met in the digital age. Indeed, they are better met now than ever before.

The GAO report also contained a discussion corresponding to this silo fallacy. The GAO noted that to develop an estimate of the effect of infringement on the overall U.S. economy, rightsholders have applied RIMS II economic multipliers¹¹¹ to the estimates of economic loss for specific copyright industries. The GAO found that “using the RIMS II multipliers in this setting does not take into account the two fold effect: (1) in the case that the counterfeit good has similar quality to the original, consumers have extra disposable income from purchasing a less expensive good, and (2) the extra disposable income goes back to the U.S. economy, as consumers can spend it on other goods and services.”¹¹² Similarly, the GAO report referred to an expert’s view that the “effects of piracy within the United States are mainly redistributions within the economy for other purposes and that they should not be considered as a loss to the overall economy. He stated that ‘the money does not just vanish; it is used for other purposes.’”¹¹³

Considering the harms of infringement in isolation risks overlooking the dangers of eliminating the balance in our IP system. As discussed above, excessive application of the patent

¹¹¹ The Department of Commerce’s Bureau of Economic Analysis make multipliers available through its Regional Input-Output Modeling System (RIMS II). These multipliers allow the estimation of the impact of a specific change in one sector on the entire economy.

¹¹² GAO Report *supra* note 19, at 23 (referring to an Institute of Policy Innovation study).

¹¹³ *Id.* at 28. See Annelies Huygen *et al.*, *Ups and Downs: Economic and Cultural Effects of File Sharing on Music, Film and Games* (2009). See also John Karaganis, *Piracy and Jobs in Europe: Why the BASCAP/TERA Approach is Wrong* (2010), <http://blogs.ssrc.org/datadrip/wp-content/uploads/2010/03/Piracy-and-Jobs-in-Europe-An-SSRC-Note-on-Methods.pdf> (“Within any given country, piracy is a reallocation of income, not a loss. Money saved on CDs or DVDs will be spent on other things—housing, food, other entertainment, etc.”).

laws restricts competition and retards follow-on innovation. Overly broad trademark laws could threaten business models that depend on keyword advertising or distribution of authentic goods through e-commerce websites.

Moreover, many sectors of the U.S. economy rely heavily on fair use and other limitations to copyright law. Examples of new technologies that could not exist but for these limitations on copyright protection include:

- **search engines** (Search engines copy the World Wide Web onto their servers, and perform their searches for responsive websites on their cached copy of the Web. Fair use permits this copying.¹¹⁴)
- **hosting sites** (Hosting sites allow third parties to publish content to a global audience. The safe harbors of the DMCA' discussed below, limit the sites' liability for infringing material, thereby enabling the sites to provide hosting services at an affordable rate.¹¹⁵)
- **browsers, computers and consumer electronics** (All digital technologies operate by repeatedly making temporary copies of software and other copyrighted content. The Betamax doctrine and fair use limit the liability of manufacturers for the copies made by their users.¹¹⁶)
- **interoperable software** (Computer programmers can develop software products that compete with programs produced by dominant firms only if copyright does not protect interface specifications or prevent reverse engineering.)

¹¹⁴ See Jonathan Band, *Google and Fair Use*, 3 J. BUS & TECH. L 1 (2008).

¹¹⁵ 17 U.S.C. § 512 (c).

¹¹⁶ Under the *Betamax* doctrine articulated by the Supreme Court in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), a manufacturer is not contributorily liable for infringements made using its technology so long as the technology is capable of a substantial noninfringing use.

These technologies have led to the creation of highly successful U.S. companies, which have generated significant employment and revenue. Additionally, these technologies have dramatically improved the efficiency of the U.S. economy.

Balanced IP also advances important non-economic values.

- **Education.** Students and educators at all levels rely heavily on fair use and other copyright exceptions for: the photocopying of a newspaper article for classroom use; the quotation of a passage from a novel in a term paper or article; the performance of a film in a classroom; the display of a chart in an online course; the posting of a chapter on a course website; and the creation of a multimedia project.
- **Free speech.** Effective critiques of governments, politicians, and the news media require the use of clips from news programs, political advertisements, and other broadcasts. Free speech is chilled unless the entire distribution chain is sheltered from copyright liability, including the person who created the content; the website that hosts the content; and the search engine that links to the website.¹¹⁷ Similarly, criticism of companies and their products, including comparative advertising, would be impossible without trademark fair use and related limitations.¹¹⁸
- **Privacy.** The DMCA's limitation on the liability of providers of online services eliminates their incentive to monitor the activities of their users to ensure that the users are not engaged in infringing conduct. Additionally, the DMCA specifically provides

¹¹⁷ Fair use also protects free speech in more traditional formats. For example, *The Daily Show*, broadcast on Viacom's Comedy Central cable channel, makes heavy use of clips from Fox News and other networks. The Administration's 2010 Joint Strategic Plan on Intellectual Property Enforcement states that "fair use of intellectual property can support innovation and artistry. Strong intellectual property enforcement efforts should be focused on stopping those stealing the works of others, not those who are appropriately building upon it." The White House, 2010 Joint Strategic Plan on Intellectual Property Enforcement 4 *available at*

http://www.whitehouse.gov/sites/default/files/omb/assets/intellectualproperty/intellectualproperty_strategic_plan.pdf
¹¹⁸ See, e.g., Jonathan Band and Matthew Schruers, *Toward a Bright-Line Approach to [Trademark]sucks.com*, THE COMPUTER & INTERNET LAWYER (July 2003), *available at* <http://www.policybandwidth.com/doc/JBand-TrademarkSucks.pdf>.

that the availability of the safe harbors is not conditioned on “a service provider monitoring its service or affirmatively seeking facts indicating infringing activity....”¹¹⁹

The National Broadband Plan recently released by the Federal Communications Commission properly recognizes both sides of the IP equation. It notes that “[t]he Internet must be a safe, trusted platform for the lawful distribution of content. At the same time, copyright protection efforts must not stifle innovation; overburden lawful uses of copyrighted works; or compromise consumers’ privacy rights.”¹²⁰

9. The Relevance Fallacy

Even if we assume that data submitted by rightsholders is sound, estimates are never universally applicable to all discussions. Data must be assessed in relation to the proposition for which it is cited. For example, aggregated estimates including physical, offline infringement are not helpful to decision-making with respect to Internet downloading. Similarly, aggregated estimates of counterfeiting and infringement “losses” are no more probative to a discussion limited to copyright (or to trademark) than total U.S. fruit exports are relevant to decisions on apple subsidies.¹²¹ Conversely, global data cannot reasonably support claims about domestic policy issues. For example, figures that purport to quantify the *worldwide* costs of piracy,¹²² absent U.S.-specific data, are not useful in a decision about whether state law enforcement officials should enforce Federal Copyright, whether to increase U.S. statutory damages, or how to allocate federal domestic law enforcement dollars. Such numbers would be useful, however, in assessing how to allocate funds between domestic and foreign priorities, but only if the

¹¹⁹ 17 U.S.C. § 512(m)(1).

¹²⁰ FEDERAL COMMUNICATIONS COMMISSION, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN (2010) at 57-58, *available at* <http://www.broadband.gov>.

¹²¹ See IPI Study, *supra* note 26, at 6 (noting use of physical piracy numbers in creation of study); *see also* LECG Study *supra* note 26, Appx. E.1 (making use of revenue loss estimates that include both piracy and counterfeiting)

¹²² See LECG Study, *supra* note 26, Appx. tbls. B.2, B.3, and E.1; IPI Study, *supra* note 26, at 5-10.

worldwide figures could be reasonably compared to U.S. cost estimates arrived at through the same methodology.

10. Conclusion to Discussion of Economic Impact of Infringement

The GAO report raises serious questions about the accuracy of copyright industry studies concerning: 1) the amount of infringement; 2) the copyright industry losses resulting from the infringement; and 3) the effect of copyright industry losses on the U.S. economy as a whole. Because several of these studies build on one another, the inaccuracies at each stage are compounded, resulting in estimates of economic harm that have limited credibility. Significantly, the industry studies criticized by the GAO report are precisely the same studies the rightsholders rely upon in their advocacy before Congress and the Administration.

There is no doubt that infringement occurs or that this infringement has had a negative impact on some rightsholders.¹²³ If nothing else, infringement has unintended distributional consequences within and outside of the U.S. economy. Intellectual property is not the only tool in the government's innovation toolbox, but robust protection for rights – concurrent with robust exceptions where necessary – is widely accepted as one important component of innovation policy. Nevertheless, the GAO report confirms that there is presently no credible data that justifies the federal intervention on the scale proposed by the rightsholders in numerous fora.¹²⁴

In questioning the accuracy of the data concerning infringement generally, the GAO also casts doubt on the studies concerning the amount of counterfeiting. Notwithstanding the difficulty in quantifying the extent of counterfeiting, we fully support devoting more federal

¹²³ See GAO Report *supra* note 19 at 11-12.

¹²⁴ Perhaps even more alarming than the GAO's conclusion that the net effects of infringement on the U.S. economy cannot be measured are the extraordinary measures the U.S. government has taken over the past two decades to protect copyright owners in the complete absence of concrete evidence that such protection would benefit the U.S. public. Congress has extended the term of protection by twenty years, prohibited the circumvention of technological protection measures, treated exportation as an infringement, trebled the maximum award of statutory damages from \$50,000 to \$150,000, and imposed new criminal penalties for a variety of activities, including camcording films in movie theatres and distributing works without financial motive.

resources to the prevention of counterfeiting, particularly with respect to counterfeiting that harms public health, security, and safety. These harms to the public are qualitatively different from the general economic harm that tends to be associated with infringement. The counterfeiting of pharmaceuticals, spare parts, and information technology products also is qualitatively different from the counterfeiting of luxury goods, particularly when the consumer knows he or she is purchasing a low-priced knock-off.

III. COPYRIGHT, INFRINGEMENT AND INNOVATION

In the notice of inquiry, the Task Force identifies “a dual public policy imperative – to combat online copyright infringement more effectively and to sustain innovative uses of information and information technology.”¹²⁵ The notice implies, but does not directly state, that these imperatives may be in tension with one another. We believe that they often are. So does the Supreme Court. In *MGM v. Grokster*, the Court observed that “[t]he more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the trade-off.”¹²⁶

Further, as discussed above, we are skeptical of the factual underpinnings of the public policy imperative to combat online copyright infringement more effectively. In the absence of clear evidence that online copyright infringement harms the U.S. economy, as opposed to the profit margins of some companies, the Task Force should pursue this imperative with great caution, particularly to the extent that doing so may threaten “innovative uses of information and information technology.”

¹²⁵ Inquiry on Copyright Policy, Creativity, and Innovation in the Internet Economy, 75 Fed. Reg. 61419, 20 (Oct. 5, 2010).

¹²⁶ *Id.*

Justice Stevens in *Reno v. ACLU* wrote that “The Internet is a unique and wholly new medium of worldwide human communication.”¹²⁷ He observed that “It is no exaggeration to conclude that the content on the Internet is as diverse as human thought.”¹²⁸ From the user perspective, the Web is comparable “to both a vast library including millions of readily available and indexed publications and a sprawling shopping mall offering goods and services.”¹²⁹ From the publishers’ point of view, the Web “constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can ‘publish’ information.”¹³⁰

In the thirteen years since Justice Stevens wrote his opinion in *Reno v. ACLU*, the Internet has become even more central to the lives of Americans and people around the world.¹³¹ Thus, the Task Force must be even more vigilant to ensure that it does not advocate policies that endanger this essential platform for commerce and communications.¹³²

As discussed below in greater detail, we question the likely effectiveness of additional legislation strengthening our existing IP remedies. As the office of the U.S. Trade

¹²⁷ *Reno v. American Civil Liberties Union*, 521 U.S. 844, 850 (1997).

¹²⁸ *Id.* at 852.

¹²⁹ *Id.* at 853.

¹³⁰ *Id.*

¹³¹ When visiting China last year, President Obama said that access to information was a universal right. He added, “I am a big believer in technology and I’m a big believer in openness when it comes to the free flow of information. I think that the more freely information flows, the stronger the society becomes, because then citizens of countries around the world can hold their own governments accountable. They can begin to think for themselves. That generates new ideas. It encourages creativity. And so I’ve always been a strong supporter of open Internet use....I can tell you that in the United States, the fact that we have...unrestricted Internet access is a source of strength, and I think it should be encouraged.” President Barack Obama Remarks at Town Hall Meeting with Future Chinese Leaders, Museum of Science and Technology, Shanghai, China (Nov. 16, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-barack-obama-town-hall-meeting-with-future-chinese-leaders>. This year, Secretary Clinton said: “We will promote new tools of communication, so people are empowered to connect with one another – and, in repressive societies, to do so with security. We will support a free and open Internet, so individuals have the information to make up their own minds.” Secretary Hillary Clinton, Remarks on Internet Freedom, The Newseum, Washington, D.C. (Jan. 21, 2010), available at <http://www.state.gov/secretary/rm/2010/01/135519.htm>.

¹³² There are over 1.73 billion Internet users worldwide, with over 252,908,000 Internet users in North America. More than 18 trillion non-spam emails were sent in 2009. At the end of 2009, there were over 234 million websites, and 81.8 million .com domain names. Internet 2009 in numbers, Jan. 22, 2010, <http://royal.pingdom.com/2010/01/22/internet-2009-in-numbers/>.

Representative informed the House Judiciary Committee's Subcommittee on Courts, the Internet, and Intellectual Property, the United States' model for protecting intellectual property rights is the "gold standard" of the world, suggesting that further amendment is unnecessary.¹³³ The existing framework of laws strikes the appropriate balance between combating online copyright infringement and sustaining innovative uses of information and information technology. Indeed, if the Task Force recommends legislative amendments, the amendments should be directed at expanding innovative uses of information, rather than harsher penalties.

1. The Balance in Existing Copyright Law Relating to the Internet

A. DMCA

When Congress enacted the DMCA in 1998, it established the framework for copyright enforcement in the Internet environment. The framework has two basic elements. First, in Title I, Congress implemented the provisions of the World Intellectual Property Organization Internet Treaties regarding technical protection measures. 17 U.S.C. § 1201(a)(1) prohibits the circumvention of technological measures that control access to copyrighted works. Section 1201(a)(2) prohibits the trafficking in devices that enable such circumvention. Section 1201(b) prohibits the trafficking in devices that circumvent technological measures that prevent copyright infringement. Section 1202(a) prohibits the distribution of false copyright management information. Section 1202(b) forbids the removal or alteration of copyright management information.

Second, in Title II, Congress fashioned limitations on copyright liability for Internet service providers that created incentives for the services providers to work cooperatively with

¹³³ International Piracy: The Challenges of Protecting Intellectual Property in the 21st Century, Before the House Comm. on the Judiciary Subcomm. on Courts, the Internet, and Intellectual Property, 110th Cong. (Thurs. Oct. 18, 2007) (statement of Asst. USTR Victoria Espinel).

copyright owners. To qualify for the safe harbors, a service provider had to adopt and reasonably implement “a policy that provides for the termination in appropriate circumstances of the subscribers and account holders of the service provider’s system or network who are repeat infringers....”¹³⁴ Additionally, providers of hosting and search services had to comply with the statute’s notice and takedown regime. Upon receiving a compliant notice of claimed infringement from the copyright owner, the service provider had to “respond[] expeditiously to remove, or disable access to, the material that is claimed to be infringing....”¹³⁵

The notice and takedown regime carefully balances the interests of copyright owners and service providers. In essence, it provides copyright owners with automatic injunctive relief stopping alleged infringement without stepping into court. At the same time, it shelters service providers from liability for infringing activity initiated by millions of third parties. Although both copyright owners and service providers share responsibility under the DMCA for enforcing copyrights, the “DMCA notification procedures place the burden of policing copyright infringement – identifying the potentially infringing material and adequately documenting infringement – squarely on the owners of copyright.”¹³⁶

The DMCA is not perfect. It reflects a legislative compromise with omissions and ambiguities that have led to inconsistent judicial interpretations. Companies have attempted to misuse Title I to prevent legitimate competition unrelated to copyright infringement.¹³⁷ Title I

¹³⁴ 17 U.S.C. § 512(i)(1)(A).

¹³⁵ 17 U.S.C. § 512(c)(1)(C), (d)(3).

¹³⁶ *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1113 (9th Cir. 2007).

¹³⁷ *See, e.g., Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 381 F.3d 1178 (Fed. Cir. 2004) (manufacturer of garage door openers alleged DMCA violation by maker of universal garage remote control); *Storage Technology Corp. v. Custom Hardware Engineering and Consulting, Inc.*, 421 F.3d 1307 (Fed. Cir. 2005) (manufacturer of computer products alleged DMCA violation by competing independent service organization); *Lexmark v. Static Control Components*, 387 F.3d 522 (6th Cir. 2004) (manufacturer of computer printers alleged DMCA violation by manufacturer of compatible ink cartridges).

has also placed undue restrictions on educators and innovative technologies.¹³⁸ Likewise, companies have misused Title II to force the removal of material that did not infringe copyright.¹³⁹ Title II has also been abused to chill political speech by demanding the takedown of newsclips and ads from campaign websites.¹⁴⁰

Nonetheless, the DMCA remains the appropriate framework for copyright enforcement in the Internet environment.¹⁴¹ We believe that amendment of the DMCA at this time is unnecessary and unwise. Some have suggested that Congress convert the Section 512(i)(1)(A) requirement of a policy for terminating the accounts of repeat infringers into an explicit “three strikes” rule. Under such a rule, a service provider would have to terminate a subscriber’s access to the Internet upon receiving three claims of infringing conduct. Internet access is simply too important a feature of economic and personal activity to require termination in all cases after three unproven allegations of infringement by a rightsholder. While this concept has received some traction in Europe, it violates due process rights enshrined in the U.S. Constitution. It also

¹³⁸ See ELECTRONIC FRONTIER FOUNDATION, UNINTENDED CONSEQUENCES: TWELVE YEARS UNDER THE DMCA, <http://www EFF.org/wp/unintended-consequences-under-dmca>. For example, rightsholders have used the DMCA to prohibit technologies that would allow users to store digitally the DVDs they purchased.

¹³⁹ See generally chillingeffects.org. See, e.g., *Lenz v. Universal Music Corp*, 572 F.Supp.2d 1150, 1154 (N.D. Cal. 2008) (record company sent DMCA notice without considering whether video was fair use); *Online Policy Group v. Diebold, Inc.*, 337 F.Supp.2d 1195 (N.D. Cal. 2004) (maker of voting machines alleged DMCA violation to silence critics). In *Design Furnishings, Inc. v. Zen Path LLC*, 2010 WL 4321568 (E.D. Cal. 2010), a distributor of wicker furniture sent DMCA takedown notices to eBay with respect to the listings of a competing distributor of wicker furniture, falsely alleging that it had a copyright in the design of furniture. In granting the competing distributor a temporary restraining order in its declaratory judgment action, the district court said, “To withhold a TRO would allow anyone to effectively shut down a competitor’s business on eBay simply by filing the notice that the seller’s product allegedly infringes on the complaining party’s copyright.”

¹⁴⁰ CENTER FOR DEMOCRACY AND TECHNOLOGY, CAMPAIGN TAKEDOWN TROUBLES: HOW MERITLESS COPYRIGHT CLAIMS THREATEN ONLINE POLITICAL SPEECH, <http://cdt.org/policy/cdt-releases-report-meritless-dmca-takedowns-political-ads> (2010).

¹⁴¹ A very small percentage of user-supplied content has triggered DMCA takedown notices. For example, fewer than one percent of the videos posted on YouTube have been the subject of DMCA takedown notices.

overturns the user safeguards inserted by Congress in the “counter-notice” provisions of the DMCA’s notice and putback procedures, 17 U.S.C. § 512(g).¹⁴²

Moreover, opening up the DMCA could trigger a serious examination of whether the existing counter-notification process adequately safeguards fair use and freedom of expression generally, or whether stronger measures should be employed to protect these values. Such measures could include increased penalties on rightsholders for abusing the notice and takedown process. Revisiting the DMCA could also lead to a host of other amendments opposed by rightsholders, including: clarification of the “red flag test” in 17 U.S.C. §§ 512(c)(1)(A)(ii) and (d)(1)(B); codification of the Federal Circuit’s requirement of a nexus between circumvention and infringement for section 1201 liability to attach;¹⁴³ codification of the exemptions to section 1201(a)(1) granted by the Librarian of Congress under the rulemaking authority in section 1201(a)(1)(C);¹⁴⁴ and codification of judicial interpretations limiting the applicability of section 1202 only to electronic copyright management information.¹⁴⁵

We also oppose all forms of technology mandates for filtering content. Such filters inevitably are over-inclusive, and would prohibit the transmission of non-infringing content. Filters cannot determine whether a particular transmission is permitted by the fair use doctrine or one of the Copyright Act’s other exceptions. Filters at the network level would also delay the

¹⁴² Under this procedure, a user whose content has been taken down can request the service provider to restore access to the content if the rightsholder has not initiated a copyright infringement action against the user. 17 U.S.C. § 512(g).

¹⁴³ See *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 381 F.3d 1178 (Fed. Cir. 2004); *Storage Technology Corp. v. Custom Hardware Engineering and Consulting, Inc.*, 421 F.3d 1307 (Fed. Cir. 2005).

¹⁴⁴ The rulemaking proceeding has proved to be an important mechanism for mitigating the harsh effects of the prohibition on circumvention. In the most recent rulemaking cycle, the Librarian approved an exemption for the “jailbreaking” of the iPhone. This allows users to install “apps” not approved by Apple. The Librarian also granted an exemption for certain uses of DVDs by college professors and documentary filmmakers. Press Release, Library of Congress, Librarian of Congress Announces DMCA Section 1201 Rules for Exemptions Regarding Circumvention of Access-Control Technologies (July 26, 2010), *available at* <http://www.loc.gov/today/pr/2010/10-169.html>.

¹⁴⁵ See, e.g., *IQ Group, Ltd. v. Wiesner Pub., LLC*, 409 F. Supp. 2d 587 (D.N.J. 2006) (interpreting § 1202 to apply only to “automated copyright management systems functioning within a computer network environment”).

flow of information. Finally, technology mandates would impede innovation; regulation and legislation move far more slowly than technology.¹⁴⁶

B. Secondary Liability

The DMCA operates against the backdrop of secondary liability principles. While the Patent Act sets forth the standards for secondary patent liability in 35 U.S.C. §§ 271(b) and (c), copyright secondary liability is judge made. As a result, standards for secondary copyright liability are unstable and constantly evolving. Nonetheless, the courts in general have succeeded in applying these secondary liability principles in Internet-related cases in a manner that has imposed liability on bad actors while allowing legitimate businesses to provide innovative products and services. Accordingly, the Task Force should not advocate legislative amendments in this area.

Historically, there have been two forms of secondary copyright liability: contributory infringement and vicarious liability. In the past, courts have imposed vicarious liability on a person who “has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.”¹⁴⁷ The Supreme Court in *MGM v. Grokster* reformulated the historic standard: a person “infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it.”¹⁴⁸ It is unclear whether this reformulation substantively changed the historic standard. Moreover, the lower courts have only begun to

¹⁴⁶ S. 2048 in the 107th Congress would have authorized the Federal Communications Commission to establish a “security system standard” with which all “digital media devices” would have had to comply. S. 2686 in the 109th Congress would have authorized the FCC to establish a rule requiring digital television receivers to respond to a broadcast flag to prevent the uploading of broadcast signals onto the Internet. Early filtering technologies focused solely on blocking content. In contrast, current systems enable rightsholders to choose between blocking and monetization opportunities. Legal filtering mandates would prevent this experimentation and innovation. Legal mandates would also impede the development of appropriate user protections.

¹⁴⁷ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001).

¹⁴⁸ *MGM Studios Inc. v. Grokster Ltd.*, 545 U.S. 913 (2005).

apply the *Grokster* standard to fact patterns involving imperfect filtering technologies and websites which receive advertising revenue based on traffic to the website.

There has been even more confusion with respect to contributory infringement. Traditionally, a contributory infringer is “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another....”¹⁴⁹ But *Grokster* states that “one infringes contributorily by intentionally inducing or encouraging direct infringement.” Lower courts have had great difficulty applying *Grokster* because they are uncertain whether it is just restates the traditional test or announces a new standard. And if it does announce a new standard, they are unsure what that standard is. Is inducement a third form of secondary copyright liability? Or does *Grokster* instead replace the knowledge test in contributory infringement with an intent test? Indeed, two different post-*Grokster* panels in the Ninth Circuit articulated inconsistent tests for contributory infringement in different cases involving the same plaintiff.¹⁵⁰

Grokster contains other ambiguities. For example, the two concurring opinions in *Grokster* offered different interpretations of *Sony v. Universal*, 464 U.S. 417 (1984). However, the unanimous *Grokster* Court agreed that under *Sony*, the act of designing and distributing a technology capable of a substantial noninfringing use, by itself, could not trigger contributory infringement liability.

In the digital era, there is a further level of complication with respect to secondary liability: whether one is a direct or secondary infringer. Although the precise tests for secondary copyright liability are uncertain, they without question are harder for a plaintiff to satisfy than the strict liability standards for direct infringement. As discussed above, digital technology operates

¹⁴⁹ *Napster*, 239 F.3d at 1019.

¹⁵⁰ *Compare* Perfect 10 v. Amazon.com, 508 F.3d 1146 (9th Cir. 2007) with Perfect 10 v. Visa International Service Association, 494 F.3d 788 (9th Cir. 2007).

by the making of copies of varying duration in computer memory. Some of those copies may be so transient as to not meet the statutory requirement of fixation. But if the copy lasts long enough to meet the fixation requirement, who is making the copy? The user who uploads the content, or the service provider whose equipment hosts the content? The copyright owner prefers for the court to treat the service provider as the direct infringer, because then strict liability attaches. In contrast, the service provider prefers for the court to treat it as a secondary infringer, thereby requiring the copyright owner to prove the elements of contributory infringement or vicarious liability. Courts have found that direct infringement requires a volitional act with respect to the specific work at issue; and that providing equipment that automatically processes content provided by a user does not satisfy this volitional act requirement.¹⁵¹

In the Internet environment, a vast number of entities could be sued for secondary infringement, including: Internet access providers (e.g., libraries, universities, Starbucks, Verizon, and Comcast); providers of Internet services (search engines, webs hosts, email providers, e-commerce sites); financial services companies (credit card companies and other payment systems); computer hardware and software developers; and shippers who deliver infringing physical goods (UPS and FedEx). The DMCA may apply to some of these entities, but only if they meet its requirements.¹⁵² And even if they do fall within the DMCA's safe harbors, they still can be liable for injunctive relief; the DMCA just frees them from liability for money damages.

¹⁵¹ CoStar Group, Inc. v. LoopNet, Inc., 373 F.3d 544 (4th Cir. 2004); Cartoon Network LP LLP v. CSC Holdings, Inc., 536 F.3d 121 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2890 (2009)

¹⁵² The DMCA would not apply to credit card companies, computer hardware and software developers, and shippers.

Notwithstanding the uncertainty concerning the precise scope of secondary liability, the courts in Internet cases have generally succeeded in distinguishing bad actors from legitimate companies. Thus, courts have imposed liability on Napster, Aimster, Grokster, LimeWire, and Isohunt, but not on YouTube, eBay, and Visa. Given that the courts have reached the right result in most of these secondary liability cases, and that attempting legislatively to clarify the standards for secondary copyright liability would be enormously contentious,¹⁵³ the Task Force should not recommend Congressional action in this area.

C. Fair Use

In addition to secondary liability principles, the DMCA's environment includes the fair use doctrine. The DMCA provides Internet companies with relief from certain copyright remedies when they engage in a specific set of activities. Fair use, by contrast, permits a court to exercise its judgment to permit otherwise infringing content. The DMCA is definite, rigid, and relatively narrow; fair use is indefinite, flexible, and accommodating. Together, the DMCA and fair use create a legal environment with both a degree of certainty and flexibility. This combination of attributes encourages Internet companies to invest in innovative products and services.

i. Fair Use and Search Engines

Search engines, the basic tool that allows users to find information on the Internet, rely on fair use in their daily operations. A search engine firm sends out software "spiders" that crawl publicly accessible websites and copy vast quantities of data into the search engine's database. As a practical matter, each of the major search engine companies copies a large (and increasing) percentage of the entire World Wide Web every few weeks to keep the database

¹⁵³ Prior to the *Grokster* decision, Congress tried unsuccessfully to codify an inducement standard for copyright secondary liability. See Jonathan Band, *So What Does Inducement Mean?*, <http://www.policybandwidth.com/doc/inducement.pdf>.

current and comprehensive. When a user issues a query, the search engine searches the websites stored in its database for relevant information. The response provided to the user typically contains links both to the original site as well as to the “cache” copy of the website stored in the search engine’s database.

Significantly, the search engines conduct this vast amount of copying without the authority of the website operators. Although the search engines will respect an exclusion header, a software “Do Not Enter Sign” posted by a website operator, the search engines does not ask for permission before they enter websites and copy their contents. Rather, the search engine firms believe that the fair use doctrine permits their activities. In 2003, the Ninth Circuit in *Kelly v. Arriba Soft*¹⁵⁴ confirmed that search firms were correct in this belief. The court found that the caching of reduce-sized images copied from websites, and the display of these images in response to search queries, constituted a fair use. Relying on *Kelly*, the district court in *Field v. Google*¹⁵⁵ excused Google’s display of text cached in its search database as a fair use. In 2007, the Ninth Circuit again ruled that the display of thumbnail images in response to search queries was a fair use. The court in *Perfect 10 v. Amazon.com* concluded that “the significantly transformative nature of Google’s search engine, particularly in light of its public benefit, outweighs Google’s superceding and commercial uses of the thumbnails in this case.”¹⁵⁶

Thus, the billions of dollars of market capital represented by the search engine companies are based primarily on the fair use doctrine. Moreover, the hundreds of billions of dollars of commerce on the Internet facilitated by search engines rely heavily on fair use.

To be sure, Section 512(d) of the DMCA creates a safe harbor for providers of information location tools such as search engines. However, the specific terms of the safe harbor

¹⁵⁴ *Kelly v. Arriba Soft*, 336 F.3d 811 (9th Cir. 2003).

¹⁵⁵ *Field v. Google*, 412 F. Supp. 2d 1106 (D. Nev. 2006).

¹⁵⁶ *Perfect 10 v. Amazon.com*, 508 F.3d 1146, 1166 (9th Cir. 2007).

apply to infringement occurring “by reason of the provider referring or linking users to an online location containing infringing material or activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link.” While search firms take the position that this safe harbor applies to all the copies a search engine makes in the course of its provision of information location services, to date no court has interpreted Section 512(d) in this manner. Furthermore, two district courts have construed the system caching safe harbor in Section 512(b) as applying to the caching performed by a search engine,¹⁵⁷ but so far no appellate court has ratified this construction.

Yet, even if sections 512(b) and (d) unquestionably applied to the full range of search engine activities, search engines would still be subject to injunctions relating to the reproductions they make during the course of performing their search function. Sections 512(b) and (d) prohibit monetary relief against an eligible service provider, but still permit injunctive relief. Moreover, a search engine is eligible for the Section 512(d) safe harbor only if it expeditiously removes material at the request of the copyright owner, and meets a variety of other conditions. As a result, even with the DMCA’s protection, a search engine could still be required to remove information relating to vast numbers of legitimate websites, to the extent that the search engine indexed that information without the express permission of those websites’ operators.

For this reason, fair use remains critical to the efficient operation of search engines. It is worth noting that EU law is much more hostile to search engines than U.S. law. No court has interpreted the EU Copyright Directive’s exception in Article 5(1) for temporary and incidental copies of no economic significance as shielding search engines from liability for the copies they make. The EU E-Commerce Directive has safe harbors for mere-conduit, caching, and hosting functions, but not for information location tools. Additionally, it is far from clear that the

¹⁵⁷ See *Field v. Google*, *supra*, and *Parker v. Google*, 422 F. Supp. 2d 492 (E.D. Penn. 2006).

caching safe harbor would apply to the kind of caching performed by search engines. The U.K. copyright law has a fair dealing exception, but it is narrower than fair use; it is limited to noncommercial uses for research or study. Finally, and perhaps most significantly, several European courts have found search engines' gathering of information from websites to violate national implementations of the EU Database Directive.

It is no accident that the world's leading search engines are all based in the United States; fair use provides a far more fertile legal environment for innovation than regimes with a handful of specific exceptions.¹⁵⁸ However, as U.S. search engines expand their operations globally, they expose themselves to infringement liability.

ii. Fair Use and Software Development

Fair use is also critical to the inner workings of digital network technology. A user's computer can access information stored on a distant server only because the software on the user's computer, on the server, and on all the computers in between, can communicate with one another. This interoperability often can be achieved only if the software developer can reverse engineer the products with which it seek to communicate. And because of the nature of software, this reverse engineering, this studying of the operation of an existing product, can require the making of temporary copies or translations of the existing program. Several courts have concluded that fair use permits the copying that occurs during the course of software reverse engineering.¹⁵⁹

iii. Fair Use and Creativity on the Internet.

¹⁵⁸ British Commonwealth countries have adopted the U.K. concept of "fair dealing," which typically is much narrower than the U.S. concept of "fair use."

¹⁵⁹ See *Sega v. Accolade*, 977 F.2d 1510 (9th Cir. 1992); *Atari v. Nintendo*, 975 F.2d 832 (Fed. Cir. 1992); *Sony v. Connectix*, 203 F.3d 596 (9th Cir. 2000).

The Internet allows every user to publish her creativity globally through blogs, bulletin boards, listserv, and websites. Much of this creative output is commentary on the news or culture of the day. Frequently, this commentary involves quotation from an article or another commentator. It may consist of a parody of a speech or a song. Or it could entail assembling a collage of small pieces of audio, visual, and textual material. Fair use makes this vital form of political and artistic speech lawful in the U.S.

Distinguishing between user-generated content that is infringing or fair use is a complex and uncertain process. Fortunately for web-hosts, Section 512(c) of the DMCA provides a safe harbor for the entities hosting the user content. With these safe harbors, the web-host does not need to make the difficult determination of whether a specific user-posted item is infringing or not. But these safe harbors provide no shelter for the user.

iv. Fair Use and End-User Copies.

Fair use permits three at least different kinds of end-user copies enabled by digital technology. First, it permits time shifting, where a user records content such as a broadcasted television program to view it at a more convenient time. Digital video recorders such as the TiVo have made time shifting easier and more pervasive than ever. With the press of a button, a user can program a DVR to record a season's worth of episodes of a favorite television program. As noted above, the Supreme Court in *Sony v. Universal* concluded that a user's recording of a television broadcast for later viewing constituted a fair use.

Second, fair use permits "space shifting" – the ability to move content from one device to another so that the user can use the content in different locations. For example, a user can transfer a copy of a song on a compact disc to her MP3 player so that she can listen to the song while exercising at the gym. In *Recording Industry Association of America v. Diamond*

Multimedia Systems, 180 F.3d 1072, 1079 (9th Cir. 1999), the Ninth Circuit considered the lawfulness of the Rio MP3 player. The court analogized space shifting to time shifting, stating that:

The Rio merely makes copies in order to render portable, or "space-shift," those files that already reside on a user's hard drive. *Cf. Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 455 (1984) (holding that "time-shifting" of copyrighted television shows with VCR's constitutes fair use under the Copyright Act, and thus is not an infringement). Such copying is paradigmatic non-commercial personal use entirely consistent with the purposes of the [Audio Home Recording] Act.

Third, fair use permits the wide range of temporary copies necessary to the digital environment, where even the most basic operations require computers to make copies. For example, for a user to view a website, the user's computer must make a temporary copy of the website in its random access memory. Courts have found these temporary copies permitted by fair use.¹⁶⁰

Significantly, these uses have become essential to the conduct of business. Workers access the Internet to locate important information throughout the work-day, making temporary copies of the websites they visit. If an employee finds an item of interest, he might time-shift it by copying it onto his hard-drive so that he can read it later. He also might space-shift it by printing it out or making a digital copy that he forwards to colleagues as an attachment to an email. Fair use is flexible enough to permit these end-user copies even in the business context.

In sum, fair use permits end-users in the United States to engage in time-shifting, space-shifting, and the making of temporary copies. The lawfulness of these activities, in turn, stimulates a robust market for the provision of devices that enable these copies. Conversely, the

¹⁶⁰ *Perfect 10 v. Amazon.com*, 508 F.3d 1146, 1169 (9th Cir. 2007) ("The copying function performed automatically by a user's computer to assist in accessing the Internet is a transformative use.")

uncertain legal status of these activities in foreign markets, or the taxes imposed upon them, has a chilling effect on the market for these products.

D. COICA

In September 2010, Senate Judiciary Chairman Patrick Leahy and other members of the committee introduced the Combating Online Infringement and Counterfeits Act (COICA), S. 3804. COICA is intended to address the problem of foreign websites that make infringing content available to U.S. users. Presumably COICA will be reintroduced in the 112th Congress. Although members of CCIA and NetCoalition support COICA's objective of combating counterfeiting and infringement, they have serious concerns about COICA that must be resolved before the bill advances in the new Congress.

COICA authorizes the Justice Department to bring *in rem* actions against domain names of websites dedicated to infringing activities. If the domain name has a foreign registry, the Justice Department can serve the order issued against the domain name on the operators of domain name system servers, financial transaction providers, and ad networks, which would then be required to discontinue providing services to these websites. This new *in rem* proceeding raises a host of issues that necessitate thorough review.

i. Interaction with U.S. Legal Process

COICA is intended as an extraordinary remedy where a foreign, rogue website is otherwise not reachable by U.S. legal process. Where a website (whether foreign or domestic) is willing to appear and defend in U.S. courts, existing legal rules should be applied and COICA should not supplant or supercede those proceedings. This is the approach, for example, that Section 512(g)(3) of the Digital Millennium Copyright Act (DMCA) employs with respect to allegedly infringing content hosted on behalf of foreign users. The current draft does not ensure

that COICA will not be used as a weapon against the domain names of sites that are not “rogues,” but are instead willing to defend their actions in U.S. courts.

ii. Jurisdiction

COICA would authorize a U.S. court to exercise jurisdiction over a foreign-registered domain name by virtue of the impact the foreign website associated with that name may have on U.S. rightsholders. It is far from clear that the due process clause of the U.S. Constitution allows a U.S. court to exercise jurisdiction in this manner.

Moreover, this approach could set a dangerous precedent for foreign countries to attempt to control content on U.S. websites. A French court found Yahoo liable for hosting auctions of Nazi paraphernalia that were viewable in France. Similarly, an Australian court exercised jurisdiction over Barron’s for alleged defamation in an article posted on a U.S. website. The issue of jurisdiction for Internet-based activity is extraordinarily complex. Until now, Congress has let the courts take the lead on how to apply traditional principles of jurisdiction to the Internet environment. Congress and the Administration must carefully consider the implications of this aggressive assertion of jurisdiction on U.S. websites that are viewable overseas.

iii. Extraterritoriality

In addition to authorizing U.S. courts to exercise jurisdiction over foreign activity, COICA creates extraterritorial remedies. A financial transaction provider would be required to prevent the use of its trademarks on foreign websites found to be “dedicated to infringing activities” under U.S. law. Similarly, an advertising network would be required to stop placing contextual or display ads on foreign websites. This would be the case even if a U.S. user no longer can access the site or purchase infringing material from it. Once again, this could be a dangerous precedent that could be exploited by other countries against U.S. businesses.

iv. Due Process

Under COICA, once a court issues an injunction against the domain name of a website dedicated to infringing activity, the Justice Department can serve the order on the operators of domain name system servers, financial transaction providers, and advertising networks. These entities would then be required to discontinue providing services to these websites. COICA, therefore, allows the Justice Department to impose obligations on these entities without first giving them an opportunity to be heard in court. In other words, the operators of websites dedicated to infringing activity receive more procedural protections than these innocent third party service providers.

v. Secondary Liability.

The new *in rem* proceeding could also have an unintended impact on copyright and trademark secondary liability. Since secondary liability in these areas is entirely judge-made, it is constantly evolving, and the language of COICA could easily shift the careful balance struck by existing law. For example, the standards in the definition of sites that are "dedicated to infringing activities" differ from those in recent judicial decisions relating to secondary copyright and trademark infringement. The new *in rem* proceeding could affect this precedent. Similarly, as noted above, COICA requires the operators of DNS servers, financial transaction providers, and advertising networks to take certain actions when served with orders issued under this statute. Courts could infer from this provision a Congressional intent that secondary liability be extended to such entities. Although COICA contains a savings clause, it may not be strong enough to prevent these affects on secondary liability.

Furthermore, potential interaction between COICA, secondary liability, and the DMCA safe harbors could unintentionally expand the scope of the legislation, reaching a much broader

array of intermediaries than those identified in the bill. For example, once a site is identified as "dedicated to infringing activity," would that constitute "red flag knowledge" sufficient to strip online service providers who provide hosting or search engines of their DMCA safe harbor protections? If so, what would their legal obligations be with respect to such sites? Moreover, because the DMCA safe harbors are limitations on liability, rather than affirmative defenses, under the existing language of COICA sites that fully qualify for the DMCA safe harbors could nevertheless find themselves declared to be "dedicated to infringing activity" because they technically "violate" Title 17 despite enjoying a limitation on resulting liability. These subtle interactions are not fully addressed by the proposed savings clause.

vi. Internet Stability

COICA could also undermine the stability of the Internet. By requiring DNS server operators to block domain names, COICA encourages users to take the easy step of switching from their ISP's name servers to offshore name servers. This, in turn, diminishes the ability of the U.S. government and ISPs to respond to cyber-attacks. According to computer security expert Dan Kaminsky, "the best place to deploy DNS filters is at the users' ISP name server. But these filters will become useless once users abandon their ISP name servers."¹⁶¹ The shift away from ISP name servers also diminishes the ability of network managers to monitor the overall activity of the network. ISP name servers "provide and extraordinarily valuable, even predictive, data stream regarding malicious behavior. Losing this stream would materially degrade our ability to secure cyber space." Additionally, a migration away from ISP name servers will make it more difficult to distribute software patches to users. "Now, with DNS [Security Extensions]

¹⁶¹ Dan Kaminsky, DNS Filtering and S. 3804, "Countering Online Infringement and Counterfeiting Act," Oct. 2010.

finally offering the real fix for cache poisoning, we see a proposal that will cause users to avoid the very servers we've spent a decade trying to secure and to get people to use."

Significantly, because of the ease of selecting an offshore name server not bound by COICA, COICA will deter few users intent on accessing infringing content. Thus, COICA would render the Internet more vulnerable to cyber-attacks, but have little impact on infringement.

vii. Voluntary Actions

The draft manager's amendment provides a safe harbor from liability for a domain name registrar that voluntarily blocks domain names of websites it "reasonably believes" are dedicated to infringing activity. This provision can be abused for anticompetitive purposes. Many domain name registrars provide other services, and they may take advantage of the safe harbor to block access to a competitor's website. Given the breadth of the definition of a website "dedicated to infringing activity" (see below), it would be easy for the domain name registrar to have a reasonable belief that a competitor's website that allows users to upload content is dedicated to infringing activity.

Furthermore, this provision may have implications for secondary liability. A domain name registrar, financial transaction provider, or advertising network could be sued by a rightsholder under a secondary liability theory for failing to take actions that would have been protected by the safe harbor.

viii. Definitions

COICA contains undefined or broadly defined terms. Of gravest concern is the sweeping definition of a website "dedicated to infringing activity." A parsing of the definition reveals that any website used for the distribution of copies with a retail value of \$1,000 could be considered a

website dedicated to infringing activity. Thus, any popular website that allows users to upload content would be subject to COICA's remedies.

The Task Force should urge Congress to carefully examine the nature of the problem the bill seeks to address, the constitutionality of the *in rem* procedure, the foreign policy implications of this approach, the impact of DNS blocking on Internet stability, and means of mitigating unintended consequences on innocent service providers.

2. International Efforts

The Internet is a global medium, and thus can be used to engage in infringing activity overseas. Rightsholders understandably seek to improve enforcement abroad with respect to Internet based infringement, and urge the U.S. government to employ international agreements to achieve this end. However, the government must ensure that its efforts to increase protection for rightsholders do not make it more difficult for U.S. Internet companies to operate overseas. This potential adverse impact on international business activities has long been our primary concern with the Anti-Counterfeiting Trade Agreement (ACTA).

A. ACTA

A review of the final (November 15, 2010) draft reveals that much of ACTA is both commendable and non-controversial. It seeks to increase cooperation among law enforcement agencies in different countries to target criminal rings that engage in commercial scale counterfeiting of pharmaceuticals and replacement parts. ACTA also attempts to harmonize border measures to make it easier for customs officials to prevent the importation of these sorts of counterfeit products which threaten public health and safety.

Unfortunately, ACTA has a much broader scope than law enforcement cooperation and border measures. It also would establish minimum IP standards among the negotiating countries.

The Office of the U.S. Trade Representative, which represents the U.S. in the ACTA discussions, has taken the position that ACTA is “coloring within the lines of U.S. law” and that the provisions proposed by U.S. officials would not require an amendment to U.S. copyright, patent, or trademark law.

This statement is true to a point. The U.S. has not advocated legal obligations that clearly exceed those in U.S. law. However, USTR is very selective in the provisions it tries to export through ACTA. It promotes U.S. style enforcement provisions without U.S. style exceptions to those provisions. Thus, USTR is pushing a one-sided, unbalanced framework. Moreover, this one-sided framework could limit the ability of Congress and the courts to change U.S. IP law in the future.

Without question, the U.S. IP laws are tougher in certain respects than those in most other countries. We have well developed secondary liability principles, under which one person can be held responsible for infringements committed by another, unrelated person, under certain relatively well defined circumstances. We also allow copyright holders to recover statutory damages, which can be as high as \$150,000 per work infringed, regardless of the actual damage suffered by the rightsholder.¹⁶²

But balancing these provisions are a well-developed system of exceptions. For example, as discussed above, both our copyright and trademark laws permit “fair use,” thereby insuring that the IP laws do not limit the free speech rights of users.

¹⁶² Most other countries allow only the plaintiff’s actual damages and any additional profits of the infringer.

ACTA would require injunctive relief against third parties and damages frameworks that could include statutory damages. But countries would not be required to adopt fair use or any of the many other exceptions and limitations in U.S. law.¹⁶³

This asymmetric export of our laws could be particularly harmful to U.S. Internet companies as they attempt to expand their operations overseas. For example, U.S. courts have treated the copying of copyrighted material by search engines as permitted by fair use. In contrast, courts in Europe have found Google and other search engines liable for copyright infringement for engaging in similar activities. If ACTA is adopted, and European countries are prompted to enact statutory damages, the potential exposure of U.S. search engines will increase exponentially. They will be liable not just for the actual damages they caused, but the level of damages set by statute.

B. Principles for International Negotiations

The U.S. positions in ACTA and the free trade agreements (FTAs) on which they are based fail to reflect significant changes that have occurred in our international trade over the past decade. In particular, these positions, to the extent that they do not require appropriate exceptions and limitation to IP protection, do not support the interests of Internet companies, the fastest growing sector of the economy. The following are key principles that should guide the U.S. in future discussions on ACTA, the FTAs, and other trade agreements such as the Trans Pacific Partnership agreement:

¹⁶³ It should be noted that the November 15 draft does contain positive language. The provision that requires enforcement procedures to apply to copyright infringement on the Internet states that “These procedures shall be implemented in a manner that avoids the creation of barriers to legitimate activity, including electronic commerce, and consistent with each Party’s laws, preserves fundamental principles such as freedom of expression, fair process, and privacy.” A footnote to this last sentence states, “For instance, without prejudice to a Party’s law, adopting or maintaining a regime providing for limitations on the liability of, or on the remedies available against, online service providers while preserving the legitimate interests of right holders.”

i. The U.S. Should Defend the Healthy Domestic Legal Landscape for U.S. Internet and Technology Firms Against a Protectionist Application of Inconsistent Laws by Foreign Courts

It is no accident that Internet and e-commerce sites have grown so rapidly in the United States. Congress has carefully crafted laws that encourage the rapid innovation and entrepreneurial spirit that is critical to Internet companies, such as Section 230 of the Communications Decency Act and Section 512 of the DMCA. As the industry expands into overseas markets, however, American companies often find their progress stymied by foreign laws. Foreign states increasingly apply their laws in a protectionist manner, obstructing U.S. Internet businesses' access to markets.

The *Parfum Christian Dior et al v. eBay* case in 2008 underscores this problem. In this case, a French court imposed damages liability on eBay for sales of legitimate Louis Vuitton goods through eBay's sites. These sales were legal under U.S. law and were in part marketed on eBay's U.S.-facing site. The French court held eBay Inc. liable because French citizens had the ability to access the U.S. site, French law prohibited sales by unauthorized distributors, and eBay enabled the sales by these third parties. In addition to awarding monetary damages, the court imposed injunctive relief that prevented the listings from being accessible to French audiences and restricted comparative advertising that is lawful in the United States.

From a trade perspective, the USTR should be concerned when French authorities penalize U.S. companies for the conduct of French citizens who find it economically attractive to import authentic goods from U.S. businesses. Moreover, the result in the French case diverges from the U.S. court opinion handed down two weeks later in the *Tiffany* case.¹⁶⁴ In *Tiffany*, the court ruled that trademark law did not require eBay to proactively police its site to prevent the sale of counterfeit Tiffany products by third parties. The court concluded that so long as eBay

¹⁶⁴ *Tiffany, Inc. v. eBay, Inc.*, 576 F.Supp.2d 463 (S.D.N.Y. 2008), *aff'd*, 600 F.3d 93 (2d Cir. 2010).

responded promptly to Tiffany's identification of listings of counterfeit goods, eBay did not infringe Tiffany's trademarks.¹⁶⁵

ii. The U.S. Should Promote a Balanced Copyright Framework that Better Reflects U.S. Law by Promoting Fair Use

The existing FTA template has long included safe harbor provisions for Internet service providers based on Section 512 of the DMCA. However, these provisions are no longer sufficient by themselves to protect the new services introduced by Internet and technology companies. Search engines, for example, function by copying millions of World Wide Web pages every few weeks into the memory of computer services, where the search firm can rapidly locate information responsive to search queries. In the absence of our robust principle of fair use, search engines would not be able to provide real time high quality search services.

Overseas adoption of a fair use provision—or a functional equivalent to our fair use framework—is critical to the ability of U.S. Internet companies to expand internationally. Most foreign copyright laws lack fair use provisions, and thus expose U.S. firms to liability overseas for activities U.S. courts permit. For example, in two cases—the Belgian case *Copiepresse* and the German case *Horn*—courts imposed copyright liability on Google for the operation of its search engine in a manner consistent with U.S. law, as established by cases such as *Kelly v. Arriba Soft Corp.*,¹⁶⁶ *Perfect 10 v. Amazon.com*,¹⁶⁷ and *Field v. Google Inc.*¹⁶⁸

In connection with consideration of the Peru FTA, Senate Judiciary Committee Chairman Leahy endorsed the concept of including fair use in our free trade agreements, saying “[u]nder

¹⁶⁵ The court stated: “While the law does not impose a duty on eBay to take steps in response to generalized knowledge of infringement, the record is clear that eBay, nevertheless, made significant efforts to protect its website from counterfeiters. As described in the Findings of Fact, eBay has invested tens of millions of dollars in anti-counterfeiting initiatives, including the VeRO Program and the fraud engine.” *Id.* at 514.

¹⁶⁶ *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

¹⁶⁷ *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

¹⁶⁸ *Field v. Google Inc.*, 412 F.Supp.2d 1106, 1123 (D. Nev. 2006).

our laws, many such new technologies and consumer devices rely, at least in part, on fair use and other limitations and exceptions to the copyright laws. Our trade agreements should promote similar fair use concepts, in order not to stifle the ability of industries relying on emerging technologies to flourish.”¹⁶⁹

While we acknowledge that exporting a fair use concept overseas is not easy, we strongly disagree with any proposal to avoid this task on the basis that ACTA or other agreement will only address remedies and enforcement. An asymmetrical agreement that facilitates strong enforcement without encouraging fair use and other exceptions will have the practical effect of promoting a copyright framework that is inconsistent with U.S. law and harmful to U.S. businesses.

iii. The U.S. Must Be Careful Not Only to Proceed Consistently with Current Law but to Preserve the Ability of Our Laws to Evolve to Keep Pace with Technologies and Business Models

As Senators Leahy and Specter discussed in their October 2, 2008 letter to Ambassador Schwab, the previous U.S. Trade Representative, ACTA must be drafted with sufficient flexibility so as to not limit Congress’ ability to make changes to our law in order to adapt to changing business models and technologies. In addition, U.S. courts typically decide several precedent-setting copyright and trademark cases each year, which can significantly change the legal landscape. ACTA and other agreements should allow for the continued development of the IP “common law” in these areas and not promote interpretations of copyright and trademark laws that are at odds with U.S. statutory law or case law.

For example, USTR currently promotes in the FTAs language that suggests that all temporary copies qualify as copies for purposes of infringement. This policy is drawn from a

¹⁶⁹ 137 CONG. REC. S14,720 (Dec. 4, 2007) (statement of Sen. Leahy).

controversial 1993 case, *MAI v. Peak*.¹⁷⁰ However, in 2008 the U.S. Court of Appeals for the Second Circuit ruled in *Cartoon Network v. Cablevision* that temporary “buffer” copies of copyrighted works that lasted 1.2 seconds were not sufficiently fixed to constitute copies for purposes of the Copyright Act.¹⁷¹

An amicus brief by the advocacy group Copyright Alliance urged the Supreme Court to review the *Cablevision* decision precisely because it was inconsistent with the temporary copy language of the FTAs and thus placed the U.S. in “potential conflict with our trading partners.” The amicus brief, therefore, cited the FTAs as grounds for rejecting improvements in our intellectual property laws.¹⁷² This underscores our position that the U.S. should not join agreements that precludes the ability of our courts to further develop copyright laws to protect evolving industries the drive innovation.

iv. The U.S. Should Oppose Any Requirement in ACTA or Other Agreements that Signatories Enact Statutory or Pre-Established Damages

While the U.S. Copyright Act does allow copyright owners to seek statutory damages instead of actual damages and profits, the high upper limit on such damages (\$30,000 per work infringed, increasing to \$150,000 in cases of willful infringement) has enabled copyright owners to seek draconian damage awards from defendants without providing any evidence of actual harm. Additionally, the threat of statutory damages in secondary liability cases has chilled innovation and created litigation opportunities for rights holders against all manner of intermediaries, including Internet companies and financial services institutions.

Indeed, as discussed above, copyright statutory damages remain controversial in the United States. Legislation was introduced in the 110th Congress to amend 17 U.S.C. § 504(c) to

¹⁷⁰ 991 F.2d 511 (9th Cir. 1993).

¹⁷¹ 536 F.3d 121 (2d Cir. 2008).

¹⁷² The Supreme Court decided not to review the Second Circuit’s decision.

permit statutory damages only in instances of direct infringement. The initial version of the PRO-IP Act included a repeal of the so-called “one work” rule in § 504(c) that allows only one award of statutory damages for the infringement of works contained in a compilation or derivative work. Repeal of this provision would have enabled exorbitant damage demands by copyright “trolls.” After vigorous debate and all day stakeholder discussion, Congress decided to drop the provision, while recognizing the need to revisit the entire statutory damages framework. Consequently, the U.S. should not promote statutory damages while we continue to explore the validity of the current U.S. framework in Congress.¹⁷³

v. The U.S. Should Oppose Any Requirement in ACTA or Other Agreements the Signatories Enact Secondary Liability Principles

No multilateral IP agreement contains a requirement concerning secondary liability, and many countries do not even have secondary liability principles in their laws. Thus, including secondary liability in ACTA would represent a major change in the framework of international IP law, and would go far beyond the enforcement focus of ACTA.

C. Activities by U.S. Government Personnel Overseas

Currently, the U.S. government personnel stationed in other countries responsible for IP matters often are trade or public affairs officers with little training in U.S. IP law. They are not aware of the balanced nature of our IP system, nor the importance of that balance to innovation and creativity. Instead, they typically recite talking points on the evils of infringement, and the need for greater enforcement. This strategy is largely ineffective. Foreign audiences view the U.S. government officials as shilling for large U.S. entertainment and software companies, demanding that consumers pay unrealistically high prices while receiving no added benefit.

¹⁷³ In the November 15 draft, countries must adopt a regime providing for statutory damages, presumptions regarding damages, or enhanced damages.

Additionally, many foreign IP officials have studied at U.S. law schools, and books by IP professors such as Lawrence Lessig and Jamie Boyle have large foreign readerships. Judicial decisions concerning fair use are globally available for free online. Thus, many decision and opinion makers overseas understand that the positions advocated by the U.S. government officials do not accurately reflect U.S. law. These foreign leaders deeply resent the double standard inadvertently applied by the U.S. government officials.

U.S. government personnel stationed abroad need to receive comprehensive training in U.S. IP law, including in particular the importance of its balanced nature to U.S. innovation. This will allow them to discuss IP policy in a more nuanced, credible manner that is more consistent with U.S. interests. Furthermore, foreign audiences will be far more receptive to an IP regime that contains exceptions for educational institutions, libraries, the visually disabled, broadcasters, new artists, and technology companies than one that benefits only rightsholders. U.S. sponsored training programs should include not only not only lawyers representing rightsholders, but also lawyers for libraries, universities, and technology companies.¹⁷⁴

D. Reevaluation of IP Foreign Policy

As noted above, for the past two decades, the U.S. government has aggressively pursued increased IP protection for American products sold overseas. The basic premise on which this approach is based is that the infringement of patents, copyrights, and trademarks abroad has decreased exports, which in turn has led to the loss of jobs in the U.S. The discussion in section II demonstrates there never has been real evidence that infringement in other countries led to job

¹⁷⁴ We are pleased to note that the 2010 Joint Strategic Plan on Intellectual Property Enforcement states in the context of building international IP enforcement capacity that the government will: “ensure that training and capacity building materials are consistent with U.S. intellectual property laws and policy goals” and “ensure that training offered by the U.S. Government on U.S. copyright law includes an explanation of the relevant balance provided in U.S. law between a creator’s rights in his or her work and specifically defined limitations on those rights.” The White House, 2010 Joint Strategic Plan on Intellectual Property Enforcement 13 *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/intellectualproperty/intellectualproperty_strategic_plan.pdf

loss in the U.S. The economic “studies” proffered by the IP industries typically consist of flimsy assumptions and unsubstantiated assertions by paid economic consultants. And our discussions of ACTA and other foreign negotiations indicate that the IP provisions we are forcing on our trading partners might actually harm the most innovative U.S. companies.

There are two other compelling reasons for the Task Force to reevaluate this policy. First, the constant browbeating of trading partners to ratchet up their protection of our IP has alienated our friends. We have forced them to change their domestic IP laws and revise their law enforcement priorities by a carrot and stick approach of promising access to our market and threatening trade sanctions. Not surprisingly, they resent being bullied. For example, Adrian Cristobal, the Director General of the IP Office of the Philippines, recently wrote that “[a]ggressive negotiations and demands for strong IPR regimes have caused resentment against the United States in most, if not all, developing countries that had to face the Americans at the negotiating table.”

Mr. Cristobal went on to say that “the United States has not been sensitive to the realities in developing societies,” particularly the issues of affordable access to medicines, knowledge and technology. Mr. Cristobal also indicated that the U.S. government’s heavy-handed approach showed a lack of “respect for sovereignty” of these developing countries.¹⁷⁵

While a “What’s good for Disney is good for America” approach to IP foreign policy may have made some sense in the past, it makes absolutely no sense in the current environment when we are trying to repair our relationships with the international community and enlist

¹⁷⁵ “The consumer surplus generated by piracy in middle-income countries is not just popular but also widely understood in economic justice terms, mapped to perceptions of greedy United States of America and multinational corporations and to the broader structural inequalities of globalization in which most developing-world consumers live. Enforcement efforts, in turn, are widely associated with the United States of America pressure on national government, and are met with indifference or hostility by large majorities of respondents.” Joe Karaganis, *Media Piracy in Emerging Economies: Price, Market Structure and Consumer Behavior* 7, available at http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_6/wipo_ace_6_5.pdf.

meaningful support in the fight against a worldwide depression, global warming, and religious terrorism. Twisting the arms of foreign governments just to help the profit margins of certain U.S. companies may result in greater diplomatic costs than economic gains.

Second, and related to the first point, perhaps the most effective way for us to gain support for our global initiatives is through soft power and public diplomacy. Rock n' roll, blue jeans, and "Dallas" played a major role in the fall of Iron Curtain. In the "clash of civilizations" with oppressive fundamentalist ideologies, we want our culture disseminated as widely as possible. We also want people throughout the developing world to have access to our pharmaceuticals. Rather than focusing solely on counterfeiting and "piracy," our government should be encouraging the broad distribution of IP products.

In short, the Task Force should perform a thorough reevaluation of our IP foreign policy. In addition to questioning the basic assumption that foreign infringement leads to loss of U.S. jobs, it should ask whether our national security interests should come ahead of preserving the profits of some companies.

3. Business Models That Discourage Infringement

The July 1 USPTO-NTIA symposium on the Copyright Policy, Creativity, and Innovation in the Internet Economy had a session on Emerging Services and Business Models for Legitimate Distribution of Copyrighted Works. We believe that in the long run, the real solution to the problem of online infringement lies in business models attractive to users rather than ever more draconian copyright regulation.¹⁷⁶ Numerous industries have developed business strategies that have had the effect of reducing the demand for infringing products. Software

¹⁷⁶ According to a recent study by Joe Karaganis of the Social Science Research Council, "we have seen no evidence – *and indeed no claims* – that enforcement efforts to date have had *any* impact on the overall supply of pirated goods." *Id.* at 5.

companies, for example, have licensed computer manufacturers to preload software on their computers prior to consumer purchase. Video game companies offer multi-player game platforms accessible only to authorized users. Some entertainment companies license their content for online distribution at low or no cost. These strategies succeed when they are designed and implemented by industry participants with a deep understanding of the relevant products, technology delivery platforms, and consumers.

Examples of successful business models for the digital distribution of content include:

- iTunes is now the largest music retailer in the United States, accounting for more than 25% of overall music sales.¹⁷⁷ There are over 400 legitimate online music services, with a total revenue of \$4.2 billion.¹⁷⁸
- Amazon now sells more ebooks for the Kindle than hardcover books.¹⁷⁹ eBook sales in the U.S. are expected to rise from a current \$1 billion to \$3 billion in 2015.¹⁸⁰
- Netflix is expected to pay rightsholders over \$2 billion for streaming rights through 2011.¹⁸¹
- X-Box Live generated over \$1 billion in the last fiscal year, with revenues driven by film and television sales.¹⁸²

¹⁷⁷ Ed Christman, *Apple Solidifies Lead Among U.S. Music Accounts, As Mobile Merchants, Fade*, BILLBOARD.BIZ, May 22, 2010, http://www.billboard.biz/bbbiz/content_display/magazine/upfront/e3i12fe2557a9382597671a522cc1cc901d.

¹⁷⁸ IFPI publishes *Digital Music Report 2010*, Jan. 21, 2010, http://www.ifpi.org/content/section_resources/dmr2010.html.

¹⁷⁹ MG Siegler, *Kindle Books Outselling Hardcover Books. 'Tipping Point' Reached, Amazon Says*, TECHCRUNCH, July 19, 2010, <http://techcrunch.com/2010/07/19/kindle-sales/>.

¹⁸⁰ Mike Melanson, *eBook Sales to Hit \$1 Billion By Year's End, \$3 Billion by 2015*, READWRITEWEB, Nov. 8, 2010, http://www.readriteweb.com/archives/ebook_sales_to_hit_1_billion_by_years_end_3_billio.php.

¹⁸¹ Mark Hefflinger, *Report: Netflix Streaming Rights May Cost \$2 Billion through 2011*, DIGITAL MEDIA WIRE, Oct. 28, 2010, <http://www.dmwmedia.com/news/2010/10/28/report-netflix-streaming-rights-may-cost-2-billion-through-2011>

¹⁸² Christopher Rick, *Online Video Pushes Microsoft Xbox Live Sales Over \$1 Billion*, REELSEO, July 8, 2010, <http://www.reelseo.com/video-pushes-xbox-live-sales/>.

Studies show that the vast majority of consumers desire legal sources of online content. They turn to infringing content when convenient and affordable legitimate content is not available.¹⁸³

The Task Force should not involve itself in the creation of business strategies for companies to compete with infringing products; this well beyond the proper role of government. At the same time, the Task Force should encourage the federal government to attempt to remove legal impediments to the development of robust legal distribution mechanisms. For instance, antitrust exemptions may be appropriate in certain markets to allow competitors to form collective licensing organizations or to cooperate in the development of distribution platforms. Also, as discussed below, copyright law may need amendment to permit mass digitization and music licensing.

Additionally, the government can reduce infringement by increasing access to government-funded research. In December 2009, the Office of Science and Technology Policy requested comments on expanding the public access policy of the National Institutes of Health to other federal agencies. We strongly support the Administration's objective of enhancing the public's access to scholarly publications resulting from research funded by federal agencies. We appreciate the Administration's dedication to maximizing the return on federal investments in research and development. We agree that increasing access to the results of government-funded

¹⁸³ Michael D. Smith, "Converting Pirates Without Cannabilizing Purchasers: The Impact of Digital Distribution on Physical Sales and Internet Piracy" (2010). In this context, it is worth noting that the holders of the copyrights in the Beatles catalog have just authorized the sale of Beatles music on the iTunes store – seven years after the iTunes store began operating. Ethan Smith, *Apple Finally Snares Beatles*, WALL STREET JOURNAL, Nov. 16, 2010, <http://online.wsj.com/article/SB10001424052748703326204575617004052395816.html>. Inexpensive legitimate distribution models are also essential to reducing infringement in the developing world. "The key question for media access and the legalization of media markets ... has less to do with enforcement than with fostering competition at the low end of media markets – the mass market that has been created through and largely left to piracy." Karaganis, *supra* note 175, at 5. Karaganis explains that a critical feature of this competition "is neither strong enforcement nor the innovative use of digital distribution, but rather the presence of firms in national markets that actively compete on price and services for local audiences." *Id.* at 4. Karaganis adds that local firms are much more likely than multinational firms "to aggressively compete for audiences on price and service – the domestic market is their market." *Id.*

research will stimulate scientific and technological innovation and competitiveness. For these reasons, we supported enactment of S. 1373/H.R. 5037, the Federal Research Public Access Act (FRPAA), in the 111th Congress. FRPAA would place valuable publicly funded research in an online location where search engines operated by our members can index and link to it. FRPAA thus would simultaneously assist the broad dissemination of important scientific information and promote the growth of the Internet. While we support FRPAA, we believe that agencies can adopt public access policies by regulation without additional legislation.

The federal government can reduce infringement of educational materials by encouraging the development of open educational resources through the award of grants for the creation of such resources.

Finally, the federal government can reduce infringement of software by supporting the broader adoption of open source software. It can do this through its procurement policy, licensing only open source software and purchasing information technology products that conform to truly open standards.

4. Voluntary Programs that Reduce Infringement

Another alternative to a law enforcement approach is voluntary initiatives among stakeholders to address infringing activity. These voluntary programs include the Digital Versatile Disc Content Control Association (DVD-CCA), content identification systems on web-hosting sites, and rightsholder management programs on e-commerce sites.¹⁸⁴ These voluntary arrangements have been successful precisely because they were voluntary. Companies cooperatively had the ability to arrive at cost-effective solutions that were appropriate to their particular technology and business models. If the government participates in the development of

¹⁸⁴ These content identification and rightsholder management systems are implemented in a manner consistent the protection of users rights embodied in the notice and putback provisions of the DMCA, 17 U.S.C. § 512(g)(2).

these private sector arrangements in any way, they cease to be truly voluntary. What the government sees as helpful encouragement, private parties may perceive as coercive pressure. Accordingly, we recommend that the Task Force acknowledge the important role of voluntary private sector agreements in preventing infringement, but that it not advocate government participation in the development of these agreements.

The following is a description of the voluntary programs adopted by two members of our organizations to cooperate with rightholders in an effort to respond to online infringement. (Other members of CCIA and NetCoalition voluntarily comply with the DMCA's notice-and-takedown regime.)

A. eBay

eBay has cooperated with copyright and trademark owners to prevent the sale of infringing goods on eBay's marketplace site. The Second Circuit described eBay's measures as follows:

By May 2002, eBay had implemented a "fraud engine," "which is principally dedicated to ferreting out illegal listings, including counterfeit listings." "The fraud engine uses rules and complex models that automatically search for activity that violates eBay policies." In addition to identifying items actually advertised as counterfeit, the engine also incorporates various filters designed to screen out less-obvious instances of counterfeiting using "data elements designed to evaluate listings based on, for example, the seller's Internet protocol address, any issues associated with the seller's account on eBay, and the feedback the seller has received from other eBay users." For nearly a decade, including the period at issue, eBay has also maintained and administered the "Verified Rights Owner ('VeRO') Program"-a " 'notice-and-takedown' system" allowing owners of intellectual property rights ... to "report to eBay any listing offering potentially infringing items, so that eBay could remove such reported listings." Any such rights-holder with a "good-faith belief that [a particular listed] item infringed on a copyright or a trademark" could report the item to eBay, using a "Notice Of Claimed Infringement form or NOCI form." During the period under consideration, eBay's practice was to remove reported listings within twenty-four hours of receiving a NOCI, but eBay in fact deleted seventy to eighty percent of them within twelve hours of notification.

On receipt of a NOCI, if the auction or sale had not ended, eBay would, in addition to removing the listing, cancel the bids and inform the seller of the reason for the cancellation. If bidding had ended, eBay would retroactively cancel the transaction. In the event of a cancelled auction, eBay would refund the fees it had been paid in connection with the auction.

In some circumstances, eBay would reimburse the buyer for the cost of a purchased item, provided the buyer presented evidence that the purchased item was counterfeit....

In addition, eBay has allowed rights owners ... to create an “About Me” webpage on eBay’s website “to inform eBay users about their products, intellectual property rights, and legal positions.” eBay does not exercise control over the content of those pages in a manner material to the issues before us....

In addition to cancelling particular suspicious transactions, eBay has also suspended from its website “‘hundreds of thousands of sellers every year,’ tens of thousands of whom were suspected [of] having engaged in infringing conduct.” eBay primarily employed a “‘three strikes rule’” for suspensions, but would suspend sellers after the first violation if it was clear that “the seller ‘listed a number of infringing items,’ and ‘[selling counterfeit merchandise] appears to be the only thing they’ve come to eBay to do.’”

By late 2006, eBay had implemented additional anti-fraud measures: delaying the ability of buyers to view listings of certain brand names, including Tiffany’s, for 6 to 12 hours so as to give rights-holders such as Tiffany more time to review those listings; developing the ability to assess the number of items listed in a given listing; and restricting one-day and three-day auctions and cross-border trading for some brand-name items.

The district court concluded that “eBay consistently took steps to improve its technology and develop anti-fraud measures as such measures became technologically feasible and reasonably available.”¹⁸⁵

B. YouTube

In October 2007, YouTube launched Content ID, an online video management platform.

Working in cooperation with rightsholders, the Content ID system helps them identify when their content is used on YouTube and lets them choose whether to block, track, or monetize the content.

“Block” means the matched content is blocked and not able to be viewed either worldwide, or in a specific territory that the content owner has defined. “Track” means the partner can see viewing statistics such as the aggregate demographics of the viewers and general locations where the content is most popular, while the matched content remains on the site.

¹⁸⁵ Tiffany v. eBay, 600 F.3d 93 (2d Cir. 2010) (citations and footnotes omitted).

“Monetize” means the content is licensed to YouTube, ads will be served around the matched content, and YouTube will share the majority of the revenue with the partner.

Content ID works in the following manner. Rightsholders can send YouTube original audio or video content or an ID File that they prepare themselves (commonly referred to as “fingerprint”). The tool is very flexible and allows partners to define different policies for each video asset and also for different territories. When a subsequently uploaded video is matched, the content owner “claims” it and the policy associated with the reference material is applied to the matched content, and the video is either blocked, monetized or tracked to receive viewing metrics. The entire matching and management process occurs in real-time, before each uploaded video is published on YouTube. This happens immediately for all new uploads, and YouTube also scans its entire “legacy” library of videos for matches against newly-added reference files a few times a year. Also, if the user believes that the claim is a mistake, he has the opportunity to contest it, and the upload then can proceed.

YouTube also provides other tools, including:

- Taking a unique “hash” of every video removed for copyright infringement and block re-uploads of that exact video file; and
- Providing content owners with an electronic notification and takedown tool, to help them more easily identify their material and notify us to take it down with the click of a mouse.
- YouTube currently has over 10,000 partners -- including major movie and TV studios, and all four major record labels. It is now monetizing over 2 billion views per week (50% growth year to date). The majority of the revenue from that advertising goes to the content partners. Hundreds of partners are making six figures a year.

Over 1000 of YouTube's partners use Content ID, including every major U.S. network broadcaster, movie studio and record label. YouTube has over 100,000 hours of reference material in its system. (Reference material refers to video or audio assets rights owners own and that user-uploaded content is matched against). Content ID scans over 100 years of video every day. The majority of YouTube's partners choose to monetize their content on YouTube. Over one third of YouTube's monetized views come from claims made via Content ID. This has led directly to a significant increase in monetizable partner inventory, as YouTube's Content ID System partners are seeing claimed content significantly increase their number of monetizable views.

5. Public Awareness of Copyright Law.

Rightsholders frequently advocate an increased government role in educating the public about infringement. Federally funded public education and awareness campaigns should focus on specific products that pose a threat to public health. If government becomes involved in education in other areas relating to infringement, it faces a difficult task of being principled, balanced, and not appearing as mouthpiece for rightsholder interests. Such education efforts would need to address copyright fair use, the first sale doctrine, and the idea/expression dichotomy. Government education efforts that are perceived as mere propaganda will actually be counterproductive and further undermine the legitimacy of intellectual property in the target audience.¹⁸⁶

¹⁸⁶ Notwithstanding the many public education campaigns in developing countries against infringement, "the lack of evidence for their effectiveness is striking." Karaganis, *supra* note 175, at 6. Karaganis adds that "efforts to stigmatize piracy have failed." *Id.* at 7. He notes that "much of what stands for long term thinking in this context rests on the hope that education will build a stronger 'culture of intellectual property' over time. We see no evidence of this in our own work or in the wide array of consumer opinion surveys conducted over the past decade." *Id.* at 5.

6. Creativity Online

As difficult as it is to measure the economic impact of online infringement, it is even more difficult to measure the effect of the Internet on the overall state of creative activity. Even if we assume that online infringement has led to lost revenue for some entertainment companies, and that lost revenue has in turn resulted in less investment in new creative activity by those companies, this negative impact must be weighed against the many positive effects the Internet has had on creative activity.

As discussed above, services such as iTunes, Kindle, Netflix and YouTube enable existing entertainment companies to distribute their content with significant compensation, either from license fees or advertising revenues. These companies also have learned how to use services such as YouTube, FaceBook, MySpace, and Twitter to promote their products. Indeed, discovery in the litigation between Viacom and YouTube revealed that Viacom employees uploaded clips on to YouTube from their personal accounts in order to create an artificial “buzz” for Viacom products. Performers such as Justin Bieber have leveraged their YouTube videos into successful careers with major record labels.

Additionally, Internet services enable authors and artists to “disintermediate” the traditional publishers and record labels and directly reach their fans. The creators receive compensation from license fees, advertising revenue, or live performances promoted via these services. By cutting out the publishers and record labels, the creators are able to keep a larger share of the revenue. Likewise, thousands of individual programmers develop “apps” that are sold through the iTunes store or other websites.

Further, the Internet provides a means for the creation and distribution of vast amounts of content where the creators do not seek financial reward. The free online encyclopedia,

Wikipedia, is primarily written collaboratively by anonymous volunteers. It has more than 91,000 active contributors working on more than 17,000,000 articles in over 270 languages. English Wikipedia contains 3,478,986 articles with 22,232,894 pages.¹⁸⁷ Flickr hosts 5 billion of photographs.¹⁸⁸ Over 125 million bloggers comment on politics, food, travel, and a host of other topics, ranging from the esoteric to the trivial.¹⁸⁹ Thirty-five hours of video are uploaded to YouTube every minute.¹⁹⁰ If the four major networks (ABC, NBC, CBS, and Fox) aired new content twenty fours a day and seven days a week from the moment of their founding until now, they would not have broadcast as much content as YouTube has in the past six months.

The entertainment companies and some policymakers have a dismissive attitude towards user-generated content, suggesting that it is far more frivolous and of lower quality than the material created by the commercial entertainment companies. Without question, much user generated content is frivolous and of low quality. But so is much of the content distributed by entertainment companies. It is hard to argue that *The Real Housewives of D.C.* or songs with misogynistic lyrics have more redeeming social value than the Jib-Jab remixes, the Obama Girl videos, Randy Pausch's Last Lecture or the Wikipedia articles we all consult. One of the rightsholders that has most aggressively attacked alleged online infringement is Perfect 10, a publisher of images of naked women who have not been surgically altered.¹⁹¹ The Task Force

¹⁸⁷ Wikipedia: About, <http://en.wikipedia.org/wiki/Wikipedia:About>. Wikipedia attracts 78 million visitors a month. *Id.*

¹⁸⁸ flickr blog, Sept. 19, 2010, <http://blog.flickr.net/en/2010/09/19/5000000000/>. 30 billion photographs are uploaded to Facebook annually. Internet 2009 in numbers, Jan. 22, 2010, <http://royal.pingdom.com/2010/01/22/internet-2009-in-numbers/>.

¹⁸⁹ Internet 2009 in numbers, Jan. 22, 2010, <http://royal.pingdom.com/2010/01/22/internet-2009-in-numbers/>.

¹⁹⁰ Don Reisinger, *YouTube: 35 hours of video uploaded every minute*, CNET NEWS, Nov. 11, 2010, http://news.cnet.com/8301-13506_3-20022481-17.html?part=r. YouTube serves 1 billion videos a day. Internet 2009 in numbers, Jan. 22, 2010, <http://royal.pingdom.com/2010/01/22/internet-2009-in-numbers/>.

¹⁹¹ *See, e.g.*, Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007); Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1113 (9th Cir. 2007); Perfect 10 v. Visa International Service Association, 494 F.3d 788 (9th Cir. 2007).

must avoid formulating policies that assist one set of copyright holders at the expense of another, much larger set of copyright holders under the misimpression that the works distributed by the first set of copyright holders have greater merit than the works created by the second set of copyright holders.

7. Proposed Changes to the U.S. Copyright Act

We have argued above against legislation providing additional copyright protection for three reasons: 1) proponents of additional protection have failed to demonstrate that existing levels of copyright infringement cause harm to the U.S. economy; 2) proponents of additional protection have failed to demonstrate that additional protection would actually reduce the levels of infringement; and 3) additional protection could have a negative impact on free expression and e-commerce on the Internet. We have questioned the “public policy imperative” of combating “online copyright infringement more effectively,” particularly to the extent that it would threaten the public policy imperative of “sustaining innovative uses of information and information technology.”¹⁹² Now we focus briefly on this second imperative, assisting the Task Force to identify policies that will “maintain robust information flows that facilitate innovation and the growth of the Internet economy” and “safeguard end-user interests in freedom of expression, due process, and privacy.”¹⁹³ Specifically, we suggest several amendments to the Copyright Act that would achieve these objectives.

A. Amend Section Statutory Damages – Section 504(c)(2)

As discussed above, the existing framework of copyright statutory damages can have a chilling effect on innovation. Indeed, statutory damages are so arbitrary and unfair that a federal

¹⁹² Inquiry on Copyright Policy, Creativity, and Innovation in the Internet Economy, 75 Fed. Reg. 61419, 20 (Oct. 5, 2010).

¹⁹³ Id.

judge recently called for the reform of copyright statutory damages.¹⁹⁴ Accordingly, the Task Force should recommend that Congress consider adopting the following amendments to the statutory damages provision of Title 17 to promote predictability and fairness to manufacturers, service providers, and consumers.

i. Ensure predictability of statutory damages in secondary liability cases

Currently, an Internet service provider or a consumer electronics manufacturer could be found liable for statutory damages for each work a third party infringes while using the service or product. This potential exposure to astronomical damages chills innovation and discourages capital investment in new products and services. Accordingly, Section 504(c)(2) should include the following limitation:

“The court shall remit statutory damages for secondary infringement, except in a case in which the copyright owner sustains the burden of proving, and the court finds, that the act or acts constituting such secondary infringement were done under circumstances in which no reasonable person could have believed such conduct to be lawful.”

ii. Reduce the level of minimum damages

The existing statute contains a range of damages, but the minimum is too high. For example, a consumer is liable for a minimum of \$750 for infringement of one song that he could purchase on iTunes for under \$1.00. Even if the court finds the infringement is innocent, the minimum is still \$200. The general statutory minimum should be reduced to \$250, and the minimum for innocent infringement should be reduced to \$100. This is still more than 100 times greater than the going rate for many common works, and in the unlikely event that it is insufficient, plaintiffs may always opt for actual damages.

iii. Simplify remission of damages for non-profit institutions

¹⁹⁴ Capitol Records v. Thomas, 2008 U.S. Dist. LEXIS 84155 (D. Minn. Sept. 24, 2008).

The existing statute allows for the remission of statutory damages to libraries, educational institutions, and public broadcasters when they reasonably believed that certain activities were fair uses. However, this limitation does not apply to museums. Moreover, the limitation for libraries and educational institutions applies only to infringements of the reproduction right, not the performance, display, distribution, or derivative work right. As a result, the limitation provides little benefit, particularly for Internet uses that involve the display of a work on a website. Accordingly, the remission provision should be streamlined to read as follows:

“The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was an employee or agent of a nonprofit educational institution, museum, public broadcasting entity, library, or archives acting within the scope of his or her employment, or such institution, museum, public broadcasting entity, library, or archives itself.”

iv. Guide courts in awarding damages

As noted above, the statute sets forth a broad range for damages, but provides no guidance for courts on how they should exercise their discretion. The court is simply directed to make the award “as the court considers just.” When the case does not involve willful infringement, the court in calculating statutory damages should attempt to compensate the plaintiff, not punish the defendant. The following sentence should be added to the statute to provide this guidance:

“In determining the award of statutory damages, the court shall attempt to compensate the copyright owner for any injury he or she suffered by virtue of the infringement.”

v. Harmonize copyright willfulness with patent willfulness

If an infringement is committed willfully, the statutory maximum increases by a factor of five, from \$30,000 to \$150,000. However, the Copyright Act does not define willfulness, and there is a lack of uniformity in the courts concerning this important concept. The U.S. Court of Appeals for the Federal Circuit in *In re Seagate Technologies LLC*¹⁹⁵ defined willful infringement in the patent context. Willful copyright infringement should be harmonized with that definition:

“To establish willful infringement, a plaintiff must show by clear and convincing evidence that the infringer acted despite an objectively high likelihood that its actions constituted infringement of an obviously valid copyright.”

vi. Require the timely election of statutory damages

Current practice permits plaintiffs to delay the election between actual and statutory damages until after the jury (or court) awards both actual and statutory damages. This allows the plaintiff to “game the system” and extract higher settlements by threatening draconian damages throughout the litigation. So as not to unfairly prejudice defendants, plaintiffs should make this election in a timely manner, before the trial or the filing of a motion for summary judgment.

B. Preserve the First Sale Doctrine – Section 109(a)

For over 100 years, the first sale doctrine has been one of the basic principles of copyright law. It provides that the owner of a copy of a work may sell, rent, or otherwise dispose of that copy without infringing the copyright holder’s distribution right. The first sale doctrine is under attack from several directions. First, as discussed above, the Ninth Circuit ruled that the first sale doctrine applies only to copies manufactured in the United States. If the Supreme Court affirms the Ninth Circuit, the scope of the first sale doctrine will be narrowed dramatically.

¹⁹⁵ *In re Seagate Technologies LLC*, 497 F.3d 1360 (Fed. Cir. 2007).

Copyright owners will have the incentive to move their manufacturing operations overseas so as to avoid the first sale doctrine and exercise control over the secondary markets for their products—to the detriment of consumers who may be forced to pay higher purchase prices and then be unable to alienate the goods they purchase.

Second, the Ninth Circuit in *Vernor v. Autodesk*¹⁹⁶ ruled that a user who purchases a copy of a computer program is not an owner of the copy for purposes of the first sale doctrine if the software publisher: 1) specifies that the user is granted only a license to the copy; 2) significantly restricts the user's ability to transfer the software; and 3) imposes notable use restrictions. This ruling not only is inconsistent with Supreme Court precedent, but also could eviscerate the first sale doctrine for all copyrighted works, not just software, because the copyright owner could always declare that the transaction was a license rather than a sale, and include restrictive terms and conditions in the license. This ruling harms users and e-commerce sites that enable users to dispose of their authentic copies of copyrighted works. The ability of the copyright holder by a shrinkwrap license to force a user to waive his first sale privilege also raises concerns about license restrictions on fair use and copyright's other exceptions and limitations.

Third, it is unclear whether the first sale doctrine applies to digital copies. If a user has a copy of a work in her hard-drive, does the first sale doctrine allow her to transmit a copy to a friend if she subsequently deletes the copy in her hard-drive? As more users purchase downloads of sound recordings and other kinds of works, this issue will become more pressing.

The Task Force should carefully consider amendments to the first sale doctrine to ensure its continued vitality.

C. Orphan Works/Mass Digitization

¹⁹⁶ *Vernor v. Autodesk*, 621 F.3d 1102 (9th Cir. 2010).

The vast majority of copyrighted works have little or no economic value soon after their creation or publication. Nonetheless, these works may possess significant cultural, educational, or historical value. Authors of such works typically are willing to permit others to reproduce, distribute, perform, or display their works at no charge because the authors benefit in tangible and intangible ways from these uses. While the authors obviously would like to receive compensation for the use of the works, most authors would prefer uncompensated use over no use whatsoever; authors rarely want their creations to be ignored and forgotten.

Archives, libraries, and museums across the country are interested in digitizing parts of their collections to make them publicly accessible over the Internet. If it is clear that the copyright term for a particular work has not expired, and the owner of the copyright can be identified and located, then the archive as a general matter should not make the full text of the work publicly accessible over the Internet without seeking the owner's permission. But for many works, it is not clear whether the term has expired, or the owner cannot readily be identified or located.

Under current law, the archives might be liable for copyright infringement if it were to upload the entire orphan work onto the Internet and the owner subsequently objected. Although the owner probably suffered no actual damage because the work had no economic value, he or she might still be able to recover statutory damages. And although most authors would be pleased that their long neglected works were receiving any attention, an archives' potential exposure could be significant if it were to upload thousands of orphan works.

In the face of this potential exposure, the archives may well decide not to make the orphan works available on the Internet. This represents a significant loss to the public, which will be denied access to socially valuable information. Keeping this wealth of material off the

Internet also harms members of CCIA and NetCoalition, which benefit as more users seek more information of the Internet. Additionally, it represents a loss to most of the authors of these works, whose creations will continue to remain hidden from public sight. At the same time, keeping the works warehoused in the archives does not preserve any income stream for the owners because orphan works rarely, if ever, generate any revenue.

Accordingly, we strongly support the amendment of the Copyright Act to eliminate the barriers it places on the dissemination of orphan works. Effective orphan works legislation must balance the interests of owners and users. The statutory framework must be simple enough to avoid unnecessary transaction costs. It should not place onerous burdens on owners to preserve the copyrights. It should contain safeguards to prevent abuse prejudicial to copyright owners. And it should contain a mechanism for providing limited compensation to owners who object to the unauthorized publication of their works.

S. 2913 passed by the Senate in the 110th Congress meets these objectives. The Task Force should recommend that Congress enact orphan works legislation that is no more restrictive – and indeed perhaps less restrictive -- than S. 2913.

D. Misuse

Some copyright owners have misused the protections afforded by the Copyright Act in an effort to prevent competition. One of the clearest examples of this misuse is *Costco v. Omega*, now pending before the Supreme Court. Even if Congress did intend to restrict the first sale doctrine to copies manufactured in the United States so as to allow copyright owners to price discriminate against U.S. consumers, it is unlikely that Congress would approve of copyright being employed in that manner in this case. Here, Omega is attempting to leverage the copyright in a small logo engraved on the back of its watches into control over the distribution of the

uncopyrighted watch. This obviously is different from the situation of a publisher distributing low quality copies in a developing country at a lower price than it charges for the high quality copies it distributes in the United States.¹⁹⁷ The *Omega* case follows from an equally questionable assertion of copyright in *Quality King v. L'anza*, where the copyrighted work was the label on a shampoo bottle.

Rightholders have also taken advantage of the temporary copies made by digital technologies as a pretext for copyright infringement actions. This has occurred in cases relating to: maintenance services for computer software and hardware products;¹⁹⁸ interoperable software;¹⁹⁹ network digital video recorders;²⁰⁰ and content streaming services.

Moreover, every time an American consumer opens a book, plays a DVD, or watches a broadcast of a sporting event, she is confronted by strong language warning of what she is not allowed to do with that product under copyright law. By design or effect, many of these warnings are misleading and harmful to millions of American consumers, customers, and businesses. These ubiquitous statements often include gross misrepresentations of copyright law and characterize as unlawful acts that are explicitly permitted by law. Many such warnings forbid “unauthorized” copying and sharing of any part of their works, even when such copying or sharing is “fair use” and is permitted by law and in fact by the Constitution itself.

These warnings intimidate average people and hinder free expression. They depict as illegal many legitimate and beneficial uses made possible by the high-tech industry, and

¹⁹⁷ See Brief of Association of American Publishers as Amicus Curiae in Support of Respondents, *Costco Wholesale Corp. v. Omega, S.A.*, No. 08-1423 (U.S. filed Sept. 7, 2010).

¹⁹⁸ See, e.g., *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993).

¹⁹⁹ See, e.g., *Vault Corp. v. Quaid Software*, 847 F.2d 255 (5th Cir. 1988).

²⁰⁰ *Cartoon Network LP LLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2890 (2009).

cast a pall over the high-tech marketplace. Moreover, these misleading warnings represent an assault on the open communications and free expression vital to our society.²⁰¹

The DMCA likewise has been abused by rightsholders. For example, manufacturers of garage door openers and computer printers have attempted to use the prohibition on circumvention in section 1201 to prevent competition in aftermarkets.²⁰² Likewise, companies have misused the section 512 notice and takedown to force the removal of material that did not infringe copyright.²⁰³ Section 512 has also been abused to chill political speech by demanding the takedown of newsclips and ads from campaign websites.²⁰⁴

Section 512 has two built-in, albeit relatively ineffective, mechanisms for preventing abuse. First, a user can employ the counter-notification process of section 512(g) to request that access to taken-down material be restored if the rightsholder does not initiate a copyright infringement actions against the user. Second, under section 512(f), a rightsholder who

²⁰¹ In 2007, CCIA filed a complaint with the Federal Trade Commission stating that such practices constitutes unfair and deceptive trade practices as defined by the Federal Trade Commission Act. CCIA demanded an immediate end to these deceptive practices. In the complaint, CCIA asked the FTC to investigate the circumstances surrounding the copyright holders' systemic misrepresentations of consumer rights. Specifically named in the complaint are the National Football League (NFL), Major League Baseball, NBC-Universal, Morgan Creek Productions, Dreamworks, Harcourt Inc., and Penguin (USA) Inc. The Library Copyright Alliance urged the FTC to investigate CCIA's complaint, noting that "The false and misleading copyright warnings provided by publishers and motion picture distributors confuse library patrons and interfere with libraries fulfilling their mission."

²⁰² See, e.g., *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 381 F.3d 1178 (Fed. Cir. 2004); *Lexmark v. Static Control Components*, 387 F.3d 522 (6th Cir. 2004). The exemption granted by the Librarian of Congress for the "jailbreaking" of the iPhone prevents Apple from employing section 1201 to prevent the use of apps not approved by Apple.

²⁰³ See, e.g., *Lenz v. Universal Music Corp*, 572 F.Supp.2d 1150, 1154 (N.D. Cal. 2008) (record company sent DMCA notice without considering whether video was fair use), *Online Policy Group v. Diebold, Inc.*, 337 F.Supp.2d 1195 (N.D. Cal. 2004) (maker of voting machines alleged DMCA violation to silence critics). In *Design Furnishings, Inc. v. Zen Path LLC* (E.D. Cal. 2010), a distributor of wicker furniture sent DMCA takedown notices to eBay with respect to the listings of a competing distributor of wicker furniture, falsely alleging that it had a copyright in the design of furniture. In granting the competing distributor a temporary restraining order in its declaratory judgment action, the district court said, "To withhold a TRO would allow anyone to effectively shut down a compitor's business on eBay simply by filing the notice that the seller's product allegedly infringes on the complaining party's copyright."

²⁰⁴ CENTER FOR DEMOCRACY AND TECHNOLOGY, CAMPAIGN TAKEDOWN TROUBLES: HOW MERITLESS COPYRIGHT CLAIMS THREATEN ONLINE POLITICAL SPEECH, <http://cdt.org/policy/cdt-releases-report-meritless-dmca-takedowns-political-ads> (Sept. 2010).

“knowingly materially misrepresents ... that material or activity is infringing” is liable for damages.

In contrast, there is no statutory mechanism for addressing misuses of section 1201 or the Copyright Act itself. Some courts have recognized copyright misuse as a defense to infringement claims. Thus, the Fourth Circuit in *Lasercomb America v. Reynolds*²⁰⁵ found that Lasercomb, by the terms of its copyright license agreement, was attempting to monopolize something which clearly was not part of the bundle of rights granted by copyright: the right to develop competing software utilizing the same ideas. Similarly, in *DSC Communications Corp. v. DGI Technologies, Inc.*,²⁰⁶ the Fifth Circuit found copyright misuse when DSC used its copyright to indirectly gain control over a competitor’s use of its microprocessor cards. The court observed that “DSC seems to be attempting to use its copyright to obtain a patent-like monopoly over unpatented microprocessor cards.”

Because copyright misuse currently is only a defense to infringement actions, it provides little deterrent against rightsholders’ misuse of their copyrights to prevent legitimate competition or to chill free speech. And courts have not yet applied the copyright misuse doctrine as a defense to section 1201 claims. The Task Force should recommend that Congress consider codifying a copyright misuse provision that creates meaningful penalties that deter the misuse of copyrights.

E. Music Licensing Reform – Section 115

Above we discussed the important of eliminating barriers to the legitimate distribution of copyrighted material over the Internet. In 2005, Marybeth Peters, the Register of Copyrights, testified that “the present language of Section 115, with its compulsory license to allow for the

²⁰⁵ 911 F.2d 970, 977 (4th Cir. 1990).

²⁰⁶ *DSC Communications Corp. v. DGI Technologies, Inc.*, 81 F.3d 597, 601 (5th Cir. 1996).

use of nondramatic musical works for the making and distribution of physical phonorecords and digital phonorecord deliveries, is outdated. Reform is necessary....”²⁰⁷ The Register urged that Section 115 be amended “to facilitate the licensing of nondramatic musical works in a way that will serve the interests of composers and music publishers, record companies and other providers of recorded music, and the consuming public, especially with respect to digital audio transmissions of music.” Unfortunately, the past three Congresses failed to amend Section 115. This failure has led to extensive litigation among the parties in this space, and delayed the development of robust legal alternatives for consumers to access music. The Task Force should advise the Administration to work closely with the new Congress to resolve this problem.

IV. CONCLUSION

The spread of the global Internet has made possible the unauthorized and at times infringing distribution of certain forms of intellectual property, especially copyright-protected content. The ease and minimal cost of copying makes meaningful enforcement costly and difficult. This widely recognized problem has stirred passionate debate about how the problem should be handled by copyright owners, the government, and third parties.

At the symposium jointly hosted by USPTO and NTIA, and in other fora, the rightsholders have offered a wide variety of policy recommendations, many of which would require amendment of the U.S. Code, impose new costs on taxpayers, interfere with the functionality of the Internet, or impede the development of new digital technologies. These diverse policy recommendations generally derive from a single chain of stated or unstated assumptions. These assumptions include that:

²⁰⁷ Statement of Marybeth Peters, The Register of Copyrights, before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary, United States House of Representatives 109th Congress, 1st Session (June 21, 2005).

- estimates of intellectual property infringement can be reliably linked to an equivalent loss of sales by rightsholder industries;
- these “lost sales” figures can be causally connected to a negative effect on profits and employment in these industries and thereby the U.S. economy;
- more stringent substantive intellectual property laws will reverse these negative effects without causing any off-setting harm; and
- the federal government accordingly should undertake various intellectual property initiatives.

The lack of analytical rigor in rightsholder-commissioned studies of the cost of IP infringement to the U.S. economy leads these studies to grossly overstate the cost of infringement and the potential benefits of more stringent IP protection. This overstatement, in turn, distorts the weighing of the societal benefit of increased regulation of IP against the cost of such regulation to innovation and e-commerce. The Task Force should approach this issue with an analytical rigor – and a skepticism towards industry claims -- that has been lacking in Congress and the Executive branch over the past two decades.

The notice of inquiry states that “an important component of the growth in e-commerce is the rapid increase in the sales of digital content across the creative industries.”²⁰⁸ The notice then provides estimates of sales of digital content of less than \$10 billion in 2010. In contrast, overall Internet retail sales reached \$210 billion in 2009,²⁰⁹ and likely will be significantly higher in 2010.²¹⁰ Additionally, according to the National Economic Council, the Internet adds over \$2

²⁰⁸ Inquiry on Copyright Policy, Creativity, And Innovation in the Internet Economy, 75 Fed. Reg. 61419, 20 (Oct. 5, 2010).

²⁰⁹ Gian Fulgoni, The State of the U.S. Online Retail Economy in Q4 2009, Feb. 11, 2010, http://www.comscore.com/Press_Events/Presentations_Whitepapers/2010/The_State_of_the_U.S._Online_Retail_Economy_in_Q4_2009.

²¹⁰ This Thanksgiving weekend, 33.6 percent of shoppers bought online. Stephanie Clifford, *On a big weekend, an increase in shoppers and spending*, N.Y Times, (Nov. 20, 2010). So far in the 2010 holiday season (November 1-

trillion to annual GDP.²¹¹ In other words, the sale of digital content constitutes a small portion of overall Internet sales and an even smaller fraction of the economic contribution of the Internet. The Task Force should not allow the information policy of this Administration to be held hostage by the demands of this small but vocal industry sector.

December 3), online retail spending, excluding travel, auctions and large corporate purchases, was \$16.8 billion. There were over \$1 billion in sales on “Cyber Monday” alone, the highest one day online sales volume ever. Press Release, Dec. 5, 2010,

http://www.comscore.com/Press_Events/Press_Releases/2010/12/Cyber_Monday_Hangover_U.S._Online_Spending_Growth_Softens_After_Strong_Early_Week_Performance.

²¹¹ Exec. Ofc. Of the the President, Nat’l Econ. Council/OSTP, A strategy for American Innovation: Driving Towards Sustainable Growth and Quality Jobs, Sept. 2009, at 5, available at <<http://whitehouse.gov/administration/eop/nec/StrategyforAmericanInnovation>>.

Respectfully submitted,



Jonathan Band
policybandwidth
21 Dupont Circle NW, Suite 800
Washington, D.C. 20036
(202) 296-5675
jband@policybandwidth.com

Counsel for NetCoalition and Computer &
Communications Industry Association



Markham C. Erickson
Holch & Erickson LLP and
Executive Director, NetCoalition
400 N. Capitol Street NW, Suite 585
Washington, DC 20001
(202) 624-1460
merickson@holcherickson.com



Matthew Schruers
Senior Counsel, Litigation & Legislative Affairs
Computer & Communications Industry Association
900 Seventeenth Street NW, 11th Floor
Washington, D.C. 20006
(202) 783-0070
MSchruers@ccianet.org

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